(5)

No. 89-6332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT S. MINNICK,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 19, 1989
CERTIORARI GRANTED APRIL 23, 1990

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Mississippi Proceedings

April 9, 1987	Order entered by Circuit Court for Lowndes County, Mississippi (Hon. L.F. Williamson) sentencing petitioner to death after jury found him guilty of capital murder and imposed death sentence
June 12, 1987	Petitioner files notice of appeal to the Mississippi Supreme Court
December 14, 1988	Opinion of Mississippi Supreme Court affirming petitioner's conviction of capital murder and death sentence
October 25, 1989	Order of Mississippi Supreme Court denying petitioner's motion for rehearing
April 23, 1990	Order of the United States Supreme Court granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis*

Excerpt from Trial Transcript (Affidavit of Sheriff David Earl Williams and attached Statement of Underlying Facts and Circumstances and Affidavits of Tommy Touchstone in support of two warrants for arrest of Robert S. Minnick for capital murder all dated May 6, 1986) (Tr. E-116 to E-120)

Affidavit in State Cases

THE STATE OF MISSISSIPPI

CLARKE COUNTY

Before me, Clarke County Justice Court Judge, Tommy Touchstone of the said Clarke County, David Earl Williams, Sheriff of Clarke County, Mississippi, makes oath that JAMES (MONKEY) DYESS and ROBERT S. MINNICK on or about the 26th day of April, 1986, in Clarke County, did unlawfully, wilfully, and feloniously kill and murder LAMAR LAFFERTY and ELLIS THOMAS, human beings, with or without design to effect death, without authority of law, while they the said JAMES (MONKEY) DYESS and ROBERT S. MINNICK were then and there engaged in the commission of the crime of robbery in violation of § 97-3-19(2)(e), Mississippi Code Annotated, against the peace and dignity of the State of Mississippi.

And in support of said David Earl Williams, Sheriff of Clarke County, states under oath the underlining [*sic*] facts and circumstances incorporate[d] herein by reference as part of this affidavit. (see exhibit 1).

/s/ David E. Williams
DAVID EARL WILLIAMS
SHERIFF OF CLARKE COUNTY

SWORN TO AND SUBSCRIBED before me, the 6th day of May, 1986.

/s/ Tommy Touchstone
JUSTICE COURT JUDGE

UNDERLYING FACTS AND CIRCUMSTANCES
[Exhibit 1]

I, David Earl Williams, Sheriff of Clarke County, Mississippi, being duly sworn testify, to-wit:

The following facts and circumstances were investigated by Clarke County Sheriff's Office in conjunction with Mississippi Highway Patrol, Mississippi State Crime Lab, Jasper County Sheriff's Office, and Constables of Clarke County:

1. On April 25th, 1986, James Monkey Dyess was in custody of Clarke County Sheriff's Jail, having been convicted and sentenced to serve seven (7) years in an institution designated by the Mississippi Board of Corrections on the charge of Burglary of a Storehouse.
2. On April 25th, 1986, Robert S. Minnick was in custody of Clarke County Jail, having been previously sentenced to serve eight (8) years on the charge of Robbery on a previous date in an institution designated by the Mississippi Board of Corrections.
3. On April 25th, 1986, James (Monkey) Dyess and Robert S. Minnick escaped from the Clarke County Jail while serving sentences in the above described charges awaiting confinement in the Mississippi Department of Corrections.
4. On April 26th, 1986, Theodus Pryor, citizen of Clarke County, was hunting in the Beaver Damn Community, and saw a white person and a black person, matching the description of Dyess and Minnick, walking down a road. Mr. Pryor saw Dyess and Minnick around 8:00 A.M. on Saturday, April 26th, 1986, approximately two and one half miles from victim Thomas's house.
5. On April 26th, 1986, approximately 2:00 P.M., Marty Thomas and B.B. Beech, two (2) thirteen year old female

children visited Ellis Thomas's trailer in the Beaver Damn Community, Clarke County, Mississippi.

6. Upon approaching the trailer, Ms. Thomas and Ms. Beech were met by a white male, approximately 22 years old, short hair, medium build, approximately 5'9" tall, who threatened Ms. Thomas and Ms. Beech with a hand-gun and took them into Donald Ellis Thomas's trailer located in the Beaver Damn Community in Clarke County and tied them up. Ms. Beech and Ms. Thomas saw the bloody body of Lamar Lafferty at the east end of trailer.

7. While tied up in the trailer, Ms. Beech and Ms. Thomas saw another person with the person later identified as Robert Minnick, a black male approximately 6'2", 200 pounds, approximately 25 years old, assisting Mr. Minnick.

8. Both Ms. Thomas and Ms. Beech later identified a photo lineup of Robert S. Minnick a. [illegible]ames (Monkey) Dyess as persons who threatened and [illegible]d them up at Mr. Donald Ellis Thomas's trailer.

9. Both the original physical description of both Marty Thomas and B.B. Beech matched the description of Dyess and Minnick and upon showing of photo lineup, both Ms. Thomas and Ms. Beech identified Dyess and Minnick as the persons present in the trailer during this period of time.

10. Approximately 4:00 P.M. on April 26th, 1986, Marty Thomas and B.B. Beech reported to the Jasper County Sheriff's Office what had occurred to them in Donald Ellis Thomas's trailer house. In addition, Ms. Thomas and Ms. Beech saw the bloody body outside the trailer.

11. Upon determination that the trailer located in Clarke County, Clarke County Sheriff's Office was called to investigate the incident; the bodies found in Clarke County, Miss.

12. Upon arrival of the Clarke County Sheriff's Office, Lamar Lafferty, age 26, white male, and Donald Ellis Thomas, age 22, were found approximately 50 yards in a gully behind the trailer; each had been shot in the head at close range.

13. Upon request for autopsy, medical examiner Thomas Bennett performed an autopsy and determined that Donald Ellis Thomas, age 22, white male, was shot one (1) time in the back and one (1) time in the head, cause of death was violent homicidal. Upon examination of the autopsy of Lamar Lafferty, medical examiner determined that Lafferty was shot twice in the head, cause of death was violent homicidal.

14. Upon investigation of contents, Donald Ellis Thomas's trailer by members of his family in conjunction with the Clarke County's Sheriff's Office, the following property was missing:
    1. .41 caliber muzzle loading rifle
    2. one (1) Winchester 12 gauge shotgun, serial #L15153093
    3. one Browning 270 rifle, serial #137PM03183
    4. one (1) 12 gauge shotgun
    5. one (1) 20 gauge shotgun
    6. one (1) 22 caliber pistol
    7. ammunition

    In addition the 1982 Ford pickup, silver gray truck, license Mississippi #CE4607 was stolen from Donald Ellis Thomas.

15. In addition upon investigation of the bodies of Lamar Lafferty and Donald Ellis Thomas, it was determined that both victims' wallets containing driver's license, money, and identification were missing.

16. Later, on April 26th, 1986, driver's license of the victims' were found on the side of the road three (3) or four (4) miles from the place where Lafferty's and Thomas's bodies were found.

17. Based on all the above described facts and circumstances and in addition to the oral testimony given to the Court an arrest warrant on the charge of Capital Murder and an arrest warrant on the charge of Escape are requested.

/s/ David E. Williams
AFFIANT

SWORN TO AND SUBSCRIBED before me, this the 6th day of May, 1986.

/s/ Tommy Touchstone
JUSTICE COURT JUDGE

Excerpt from Trial Transcript (Arrest warrants for Robert S. Minnick for capital murder dated May 6, 1986) (Tr. E-121 and E-123)

WARRANT IN STATE CASES

THE STATE OF MISSISSIPPI,
CLARKE COUNTY

To The Sheriff or any Constable of said County:

WE COMMAND YOU to forthwith take the body of Robert S. Minnick charged with the crime of Capital Murder of LAMAR LAFFERTY in violation of § 97-3-19(2)(e) Mississippi Code Annotated (1972) in Clarke County, and bring him before the undersigned Justice Court Judge for an examination on said charge.

Witness my hand this 6th day of May, 1986.

/s/ Tommy Touchstone
Justice Court Judge

WARRANT IN STATE CASES

THE STATE OF MISSISSIPPI,
CLARKE COUNTY

To The Sheriff or any Constable of said County:

WE COMMAND YOU to forthwith take the body of Robert S. Minnick charged with the crime of Capital Murder of DONALD ELLIS THOMAS in violation of § 97-3-19(2)(e) Mississippi Code Annotated (1972) in Clarke County, and bring him before the undersigned Justice Court Judge for an examination on said charge.

Witness my hand this 6th day of May, 1986.

/s/ Tommy Touchstone
Justice Court Judge/Clerk

Excerpt from Trial Transcript (Hearing Exhibit No. 2; "Interrogation; Advice of Rights" dated August 25, 1986) (E-2)

Robert S. Minnick
8 OCT 1963
SSN: 336-56-4167

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place	San Diego Co. Jail
Date	25 August 1986
Time	Time 08:40 Hrs.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind had been used against me.

Signed Refused to Sign

Witness: /s/ J.C. Denham Inv. CCSD
Witness:

Time: 08:45 Aug. 25, 1986

Hearing 2/3/87

Excerpt from Trial Transcript (Hearing Exhibit No. 3; Handwritten notes of Deputy Sheriff J.C. Denham dated August 25, 1986; two documents: one captioned "Re: Jail Escape", one captioned "Re: Thomas Lafferty Homicides") (E-3 to E-7)

Re: Jail Escape:

Interview of Robert S. Minnick August 25, 1986
25 August 1986
San Diego County Jail

On Monday, August 25, 1986 at approx. 08:40 hours this office interviewed Robert S. Minnick at the San Diego County Jail. Minnick was advised of his Miranda rights prior to being interviewed.

Robert Minnick advised this officer of his escape from the Clarke County Jail. Minnick advised he and Dyess left the jail cell after the supper meal and the trash being taken out. Minnick advised he was behind the door holding it when the trusty closed and locked it. Minnick advised the way he held the door the trusty would think the door was locked.

Minnick advised he and Dyess then left out of the cell thru the fire escape door and over the fence. After clearing the fence Minnick and Dyess ran down the railroad tracks to near Desoto and west into the woods.

/s/ J.C. Denham
Inv. CCSD
Hearing
2/3/87

Interview of Robert Minnick August 25, 1986
Re: Thomas-Lafferty Homicides
25 August 1986
San Diego County Jail

On Monday August 25, 1986 at approx. 08:40 hours this officer interviewed Robert S. Minnick at the San Diego

County California Jail. Minnick was advised of his Miranda rights prior to being interviewed.

Minnick advised this officer of his actions concerning the deaths of Thomas and Lafferty. Minnick advised he and Dyess were in the woods walking. Minnick advised Dyess had told him that he knew the area real well. Minnick advised they walked in the woods for a long way. Minnick advised along the way they came across a turkey hunter and talked with him for a few minutes. Minnick advised they continued on walking and came out of the woods near a trailer.

Minnick advised Dyess told him he knew the trailer had some guns in it. Minnick advised they entered the trailer and found some guns and started collecting them up when they heard a vehicle drive up in the yard of the trailer. Minnick advised the two men and a small child stayed out in the yard for a few minutes. Minnick advised when they started toward the trailer Dyess jumped out the trailer door with a shotgun. At this point Minnick advised Dyess shot one of the men in the back with a shotgun and then in the head with a pistol. After doing this Dyess gave Minnick the pistol and made him shoot the other man while Dyess held a shotgun to Minnick's head.

Minnick advised they put the 2 yr. old child on the sofa in the trailer and Dyess drug the bodies to a gully behind the house trailer and threw them in it. Minnick advised two young girls drove up to the trailer. The girls were brought into the trailer and tied up. Minnick advised Dyess was wanting to rape and kill these girls and it was all he could do to keep from letting him do this.

Minnick advised they took the weapons from the trailer and left in the Silver Ford pickup truck. Minnick advised they took $121.00 in money from the bodies of the two men. They left and traveled south on I-59 and Hwy 11 to New Orleans.

Minnick advised after they got to New Orleans, La. they went to a guy's business who Dyess had known before. Minnick advised Dyess talked with the guy about selling the guns to him. Minnick advised they later sold the guns to this person and stayed around New Orleans for a period of time in

the Skylite Motel. Minnick advised this officer the 22 caliber pistol was thrown into a thrash can in New Orleans.

Minnick advised after leaving New Orleans by bus to Brownsville, Texas, they crossed the border into Mexico. Minnick advised they were staying in Matamoros, Mexico when he and Dyess got into a fight and Dyess tried to kill him. Minnick advised after being severely beaten by Dyess he was able to escape.

Minnick advised he then hitchhiked to California. Once getting to California he came to the San Diego area and got in touch with some friends he knew when he lived in San Diego in 1982.

Minnick advised he was using the name David Bruce Prokaska. He obtained a Drivers License, Birth Certificate and voter registration to match this ident.

/s/ J.C. Denham
Inv. C.C.S.D.

Excerpt from Trial Transcript (Hearing Exhibit No. 4; Federal Bureau of Investigation typed report dated August 23, 24, 25, 1986) (E-8 to E-10)

FEDERAL BUREAU OF INVESTIGATION
1

Date of Transcription: August 25, 1986

ROBERT SAMUEL MINNICK, was interviewed in a private room at the SAN DIEGO COUNTY JAIL. He was advised of the official identities of ALFRED GARY GUNN and JOHN H. ALLISON as Special Agents (SA) of the FEDERAL BUREAU OF INVESTIGATION (FBI) by display of credentials. SA GUNN asked "Are you ROBERT SAMUEL MINNICK?" MINNICK replied "That's what they call me." He was shown a facsimile photograph of CLARKE COUNTY inmate number 62034 taken April 21, 1986, and asked if the picture was him. MINNICK asked what this was all about. SA GUNN advised him that he was being interviewed concerning federal charges for fleeing the State of Mississippi after an escape from a Mississippi jail and murder of two persons.

MINNICK was observed to have a tattoo on his left forearm with the words "Rock & Roll Rebel." He also had a cross on the web of his right hand. GUNN commented on the scar over the right eyebrow which is visible in the photograph and on MINNICK's face.

Investigation on August 23, 1986 at San Diego, California
File SD 88A-9742

SA's ALFRED GARY GUNN AND
By JOHN H. ALLISON/mas Date dictated August 24, 1986

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency and it and its contents are not to be distributed outside your agency.

SA GUNN read the Advice of Rights part of the FD-395 (Interrogation; Advice of Rights form) and further advised MINNICK that he would probably be scheduled to appear in State Court on Monday morning, at which time an attorney would be assigned to him to represent him concerning all charges against him. SA GUNN asked MINNICK if he understood his rights, which MINNICK said that he did.

SA GUNN asked MINNICK to read the waiver part of the form and sign it if he was willing to answer questions at this time. MINNICK stated "I don't want to sign anything."

SA GUNN read the waiver to MINNICK and asked him if he understood and was willing to answer questions without an attorney present, and repeated that MINNICK could stop answering questions at any time and could choose what questions he wanted to answer.

MINNICK stated that he did not want to make a full statement or answer "very many" questions, indicating that he was willing to answer some questions. He asked what consequences he was facing. SA GUNN advised him that he was facing murder charges with a possible death penalty or life imprisonment in Mississippi. SA GUNN further advised him that anything he said would be reported to federal and state prosecutors, and that, together with the physical evidence at the scenes of the crimes in Mississippi, would be considered at trial.

MINNICK told the Agents to ask what questions they wanted to ask.

SA GUNN stated that the FBI wants to locate "MONKEY" DYESS. SA ALLISON asked where DYESS was at the time. MINNICK paused in his answer, and SA GUNN stated that the FBI believes DYESS is very dangerous. MINNICK said that DYESS was very dangerous, that he had given MINNICK the scar on his right eyebrow, and at this point MINNICK began to sob. He said "It was my life or theirs." Then he told how DYESS "beat the heck out of me" and showed marks by his right ear, nose and sinus area, and pointed to the top of his head as well as his eyebrow. He said that he was beat a couple of days or a week after the "mobile home." Speaking

of DYESS, MINNICK said "He was threatening me" right from the beginning.

MINNICK said that he wanted to leave DYESS, that he did not want to travel with him, but that DYESS made him stay with him.

SA GUNN commented that it appeared that MINNICK may have spared the lives of two other people, at which time MINNICK sobbed and said "He wanted to kill them to," referring to DYESS.

When he regained his composure, MINNICK stated that he was in jail in Mississippi for stealing a car belonging to a person who he knew who was drunk, who later reported the car stolen. He had been in CLARKE COUNTY JAIL eight to ten months and MONKEY DYESS had been there part of the time, and part of the time he was away. Authorities had sent DYESS to prison elsewhere and he had run away from there, and had then been returned to the CLARKE COUNTY JAIL, where he and MINNICK were together again. MINNICK stated that it was DYESS' idea to escape, and MINNICK went along because he did not want to serve the time facing him.

After they escaped, MINNICK and DYESS "ran and ran." MINNICK just wanted to run and get away. He stated, "We got on the road," and then we "came to the trailer." DYESS knew that there were guns in the trailer and told MINNICK that "that would be our ticket out of town." MINNICK said DYESS "would make bad faces at me" (threatening faces) and would tell MINNICK that he had to go with him. MINNICK explained that MONKEY DYESS is a "very big dude" who had already "been down" (meaning, been in prison) seven years and was "looking at" two to five years more. As they ran, MONKEY seemed to know the territory, and would not sleep and "would not let me sleep." They ran through woods and down tracks until they came to the trailer. That was when MONKEY said that the trailer would be their ticket out of town. DYESS said nothing about a vehicle, but was interested in getting the guns from the trailer. He seemed to know ahead of time that there were guns in the trailer.

At this point of the interview, MINNICK hesitated to tell what had happened at the trailer. He was reminded by inter-

viewing agents that he did not have to answer questions without his lawyer present and that he could choose which questions he wanted to respond to or could just tell the story himself.

MINNICK stated "Come back Monday when I have a lawyer," and stated that he would make a more complete statement then with his lawyer present.

At this point no further questions were asked concerning the crimes, and MINNICK furnished the following descriptive information concerning himself.

Date of birth:	September 8, 1963
Age:	22
Place of birth:	Springfield, Tennessee
Height:	5'8"
Weight:	150 pounds
Hair:	Brown
Eyes:	Blue
Tattoos displayed:	"Rock & Roll Rebel" with a little bearded man on left forearm, cross on web of right hand

He stated that when he was arrested he was carrying identification in the name of DAVID BRUCE PROKASKA, who was a nonexistant [*sic*] person.

MINNICK repeated twice his request that Agents come to see him on Monday as soon as he had a lawyer.

Excerpt from Trial Transcript (Motion to Suppress Statement dated December 5, 1986) (Tr. 20-21)

IN THE CIRCUIT COURT OF
CLARKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS

ROBERT MINNICK

MOTION TO SUPPRESS STATEMENTS

Comes now the defendant and files this motion to suppress statements and would show:

1. The defendant is in informed and believes that the State of Mississippi intends to offer evidence to the effect that Robert Minnick made statements to FBI agents and to other police officers, and the defendant would show that the statements should be suppressed.

2. None of the statements were voluntary.

3. None of the statements were made at a time when the defendant had access to counsel, and the defendant did not waive his right to the assistance of counsel. In fact the defendant affirmatively indicated the desire to have the assistance of counsel.

4. The defendant made no knowing and intelligent waiver of his rights.

5. The defendant was under much duress. When he was arrested, a swat team descended on him. Because of the circumstances of his arrest, his lack of representation by counsel, his lack of understanding of his constitutional rights, his interrogation by numerous law officers, the continual intimidation by law officers, the failure by the State of California to properly provide for him an initial appearance, the fear and lack of understanding by the defendant, his young age,

his lack of mental stability, the period of time that he was held in jail before he was interviewed, and the combined coercive interviews of numerous law officers, the defendant made involuntary statements.

6. There was no probable cause for the defendant's arrest, and his statements were fruit of the poisonous tree.

7. Wherefore, the defendant moves the Court to suppress his statements. The defendant requests that on a hearing of this matter, the State will be required to produce all officers that interviewed the defendant.

Respectfully submitted.

ROBERT MINNICK

BY: /s/ Leslie Gates

LESLIE GATES, HIS ATTORNEY
101 SHIELDS BLDG.
906 20TH AVENUE
MERIDIAN, MS. 39301
693-5967

CERTIFICATE OF SERVICE

This certifies that I have delivered a true and correct copy of the above and foregoing motion to Honorable Charles Wright this 5th day of December, 1986.

/s/ Leslie Gates

Excerpt from Trial Transcript (Bench Ruling by Court denying Motion to Suppress Statement dated February 3, 1987) (Tr. 348)

BY THE COURT: Well, you made a motion to suppress statements and I will suppress all statements made to people who were police officers in California, but I will allow Mr. Denham to state to a jury what he stated here today and I wouldn't allow him to introduce the statement into evidence which has been marked Exhibit 3. Mr. Wright, you have read Espidido versus Illinois [*sic*] and [*blank in original*] versus Williams.

Excerpt from Trial Transcript (Order Overruling Motion to Suppress Statement dated February 3, 1987) (Tr. 49)

IN THE CIRCUIT COURT OF
CLARKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI	PLAINTIFF
VERSUS	6045
ROBERT MINNICK	DEFENDANT

ORDER OVERRULING MOTION TO
SUPPRESS STATEMENTS

There came before the Court the defendant's motion to suppress statements, which the Court finds should be overruled as to statements given to J. C. Denham, and which the Court finds should be sustained as to other statements.

It is therefore ordered and adjudged that J. C. Denham may testify in front of the jury as to the oral statement given to him, but all other statements given or allegedly given by the defendant to law officers shall be suppressed.

So ordered this 3rd day of February, 1987.

/s/ L.F. Williams
CIRCUIT JUDGE

/s/ C.W. Wright
DA

As to Form:

/s/ Leslie Gates

Excerpt from Trial Transcript (Renewed Motion to Suppress Statement dated February 5, 1987) (Tr. 55)

IN THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI	PLAINTIFF
VERSUS	6045
ROBERT MINNICK	DEFENDANT

RENEWED MOTION TO SUPPRESS STATEMENT

Comes now the defendant and would show:

1. The defendant would show that there exists the additional reasons for suppression of statement as follows:

A. The statement was made with counsel not present during a critical stage of the proceedings, to-wit: extradition. Possibly counsel had already been appointed.

B. The statement may have been given in an interview that was in violation of a court order.

C. The statement given to Denham was the product of a previously coerced statement and is therefore fruit of the forbidden tree.

2. Wherefore, the defendant respectfully requests reconsideration of the Court's earlier ruling.

Respectfully submitted.

ROBERT MINNICK

/s/ Leslie Gates
BY: Leslie Gates, his attorney
101 SHIELDS BUILDING
906 20th AVENUE
MERIDIAN, MS. 39301
693-5967

CERTIFICATE OF SERVICE

This certifies that I have delivered a true and correct copy of the above and foregoing motion to Honorable Charles Wright, District Attorney for the Tenth Circuit District of Mississippi, on this 4th of February, 1987.

/s/ Leslie Gates

Excerpt from Trial Transcript (Renewed Motion to Suppress Statement dated April 6, 1987) (Tr. 187)

IN THE CIRCUIT COURT OF
CLARKE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS

ROBERT MINNICK

RENEWED MOTION TO SUPPRESS STATEMENT

Comes now the defendant and would show:

1. The defendant renews his previous motion to suppress his alleged statement.

2. The alleged statement falls squarely within the rule announced in the case *Edwards* v. *Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880. In that case, as in this case, there was custodial interrogation in which the individual in custody invoked his right to remain silent and his right to counsel; thereafter, the individual was again approached by the police and questioned and at that time the individual gave a statement. The United States Supreme Court said that the second questioning was violative of the defendant's right to have counsel present at the custodial interrogation.

3. Respectfully submitted.

Robert Minnick

BY: /s/ Leslie Gates

Leslie Gates
101 Shields Bldg.
906 20th Avenue
Meridian, Ms. 39301
693-5967

CERTIFICATE OF SERVICE

This certifies that I have delivered a true and correct copy of the above and foregoing motion to Honorable Charles Wright this 6th day of April, 1987.

/s/ Leslie Gates

Excerpt from Trial Transcript (Order Denying Renewed Motion to Suppress) (Tr. 957-58)

BY THE COURT: For the benefit of the Court Reporter confession and the questions asked by the deputy sheriff in the opinion of the Court were freely and voluntarily made by the defendant, his answers, and I believe from the evidence beyond a reasonable doubt that the confession was freely and voluntarily given, that he understood his rights.

BY MR. WRIGHT: Assumption of understandable waiver of rights. That he understood his rights?

BY THE COURT: That the defendant understood his rights.

BY MR. GATES: Does the Court find that there was a waiver of his right to counsel, right to remain silent?

BY THE COURT: Yes, sir. I find that the confession was freely and voluntarily given from the evidence beyond a reasonable doubt and it can be used and shown to the jury as such.

BY MR. GATES. Your Honor, does the Court find there was a knowing, intelligent waiver of his right to counsel, right to remain silent?

BY THE COURT: I find that the statement of the deputy sheriff was given freely and voluntarily by him to the defendant and that he responded freely and voluntarily as the confession states from the evidence beyond a reasonable doubt. Bring the jury in. W o do you have as your next witness?

Excerpt from Trial Testimony (Testimony *in limine* of Deputy Sheriff J.C. Denham) (Tr. 299-318)

J. C. DENHAM

having been called as a witness by the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. WRIGHT:

Q State your name.

A J. C. Denham.

Q You have given your occupation as Deputy Sheriff of Clarke County?

A Yes, sir.

Q And, you previously testified as to your background in law enforcement?

A Yes, sir.

Q You have some fourteen years experience?

A Yes, sir.

Q Do you know one Robert S. Minnick?

A Yes, sir.

Q Were you involved in the investigation of the death of Lamar Lafferty and Donald Ellis Thomas?

A Yes, sir.

Q And, on or about the 26th day of '86 of April the 26th, did you obtain the warrants for the arrest of Mr. Minnick?

A No, sir. The warrants were issued for Robert S. Minnick, I believe, on May the 6th.

Q And, at that time did you also—what were the warrants for—his arrest for?

A Two counts of capital murder.

Q Did you also request assistance from the States Attorney's office through the District Attorney in the Tenth Circuit Court District?

A Yes, sir.

Q And, did you request for interstate flight warrants?

A Yes, sir. They were requested to be issued on Robert Minnick and James Dyess.

Q Do you have knowledge that they were issued on those persons?

A Yes, sir.

Q While doing that were you contacted from the State of California, particlarly, San Diego, pertaining to the arrest of Robert S. Minnick?

A Yes, sir. I was notified on August 22nd, 1986.

Q And, who notified you?

A The San Diego Sheriff's Department.

Q And, what were you notified at that time?

A That they had arrested a subject there in San Diego fitting the description of Robert S. Minnick.

Q What authority did they arrest him?

A As unlawful flight.

Q And, was this with any assistance of the FBI?

A Not to my knowledge.

Q And, the procedure on unlawful flight is that the warrants would be shown on a National Crime Information Center network computer?

A Yes, sir. We were contacted by telephone and by NCIC, being the National Crime Information Center of Robert S. Minnick's arrest.

Q And, there were how many outstanding warrants for Robert S. Minnick?

A Two. Two on state charges and one on federal.

Q After that day did they give you a description of the person that they arrested that they thought was Robert Minnick?

A Yes, sir. The officer I talked with described the subject to me, gave me some locations of some tatoos and those coincided with the description of Robert Minnick.

Q What did you then proceed to do?

A They then held him on charges from Clarke County Mississippi until I arrived out there on August the 24th, 1986.

Q Did you see Mr. Minnick that day?

A No, sir. I talked with him on the next day August the 25th.

Q And, where did you talk with him?

A I interviewed him in the San Diego County Jail.

Q About what time was it on the 25th?
A Approximately 8:40 in the morning.
Q And, do you see the same Robert S. Minnick here in this court room?
A Yes, sir. To my left sitting at the table.

BY MR. WRIGHT: Let the record reflect he identified the defendant Robert Minnick.

Q Now, where were you able to interview Mr. Minnick?
A He was interviewed in an interview room inside the county jail.
Q Who was present?
A Myself and Mr. Minnick.
Q And, in what city was this?
A San Diego, California.
Q And, in what office were you interviewing him?
A The interview room was a plain office with open plate glass windows all the way around where you can see in and out.
Q Now, in this interview how big a room is it?
A Approximately 10 x 10.
Q How long was the interview?
A Approximately forty-five minutes to an hour.
Q Now, did you make any notes of your interview?
A Yes, sir. Before talking to Mr. Minnick I advised him of his Miranda Rights and read it from a form we use here in the Sheriff's Department.
Q Do you have that original form that you had on that day?
A Yes, sir.
Q And, would you tell the Court exactly the procedure you followed when you informed him of his rights?
A Before I talked to him I advised him of his rights and I can read from this form what I advised him of.
Q Do it just like you did that day.
A Before I talked to him, I said, "Before I ask you any questions, you must understand your rights. You have a right to remain silent. Anything you say can be used against you in court. You have a right to talk with a lawyer for advice

before answering any questions and have him with you during questioning. If you cannot afford a lawyer one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk with a lawyer." After advising him of this he refused to sign saying he wasn't going to give any signed statement but that he would talk to me.
Q Did he state whether or not he understood his rights?
A Yes.
Q. Did you read him anything pertaining to that waiver of rights?
A I gave him the waiver and after I read the waiver, which is, "I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."
Q Did you read that also to him?
A Yes, sir.
Q Did he state whether or not be understood his rights?
A Yes, sir.
Q Did he state whether or not he wanted an attorney present?
A He didn't ask to have a lawyer present while he talked to me.
Q Now, did you make notes, original notes, of this waiver that you described to the Court?
A This is the original waiver.

(Mr. Wright shows item to counsel opposite.)

BY MR. WRIGHT: The State moves to have this admitted as exhibit to this witness' testimony.

(ITEM IS RECEIVED AND MARKED AS EXHIBIT NO. 2 AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME

AT PAGE [*blank in original*] AND MADE A PART OF THIS RECORD.)

Q Now, Mr. Denham, did you use any threats or coercion on the defendant Minnick to get him to talk to you after he stated he understood his rights?

A No, sir.

Q Did you have any weapon on you that you pulled on him?

A No, sir.

Q Did you slap him or hit him?

A No, sir.

Q Did you make any promises to him?

A No, sir.

Q Did you make any threats to him?

A No, sir.

Q Did you deny him any rights that he had?

A No, sir. I asked him if he wanted to talk to me about what happened and he said, yes, he did.

Q That was after you informed him of what his rights were?

A Yes, sir.

Q Now, at this time did you write out a statement or did you listen to—how did you conduct the interview?

A After talking with him and leaving the jail where he was located I then wrote down what he said.

Q Do you have your original notes of what he said?

A Yes, sir.

(Mr. Wright shows item to opposing counsel.)

BY MR. WRIGHT: The State requests this be marked as Exhibit 3.

BY THE COURT: Very well.

(ITEM IS RECEIVED AND MARKED AS EXHIBIT 3 AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE _____ [*blank in original*] AND MADE A PART OF THIS RECORD.)

Q Now, Officer Denham, after informing him of his rights could you tell if he was under the influence of alcohol or drugs?

A He was not at that time.

Q Did he talk to you freely at that time?

A Yes, sir.

BY THE COURT: Do you know how long he'd been in jail?

A Since Friday afternoon, the 22nd, and I talked to him Saturday morning, the 25th—Monday morning the 25th.

Q Was it Monday morning or—

A Monday morning the 25th.

Q And, directing your attention to that time that you talked to him you made him no promises of any kind.

A No, sir.

Q Now, in conducting the interview what's the first thing that you said? Tell me what the interview consisted of.

A After advising him of his rights and asking him if he wanted to talk to me about what happened. He said it had been a long time since he had seen me and since being out in California every day he talked like he would look up and think he might see someone from here looking for him. And, at that time I asked him if—you know—if he would tell me what happened as far as them leaving the jail and what took place the next day. And, from there we started talking and he started telling me about what happened.

Q What did you say and what did he say?

A I asked him—you know—just tell me what went on first concerning how they got out of the jail and he told me that he and Dyess had been planning on escaping out of the jail the evening they broke out which was a Friday, that after the supper meal—

• • •

[*argument of counsel omitted*]

Q Do you need your notes to refresh your memory?

A Yes, sir.

Q Now, what is the first thing that the defendant Minnick told you?

A He told me about how he and James Dyess got out of the Clarke County Jail.

Q What did he say?

A He said that they had been planning on getting out on the Friday that they escaped out of the jail. They waited until after the supper meal for the trash to be taken out and when the trusty came back to unlock the door and pulled the trash—garbage cans and bags out—when he pushed the door back Minnick held the door and when the trusty turned the lock it looked like it was locked and in actuality it wouldn't be.

• • •

[argument of counsel omitted]

Q Will you continue?

A Yes, sir. He said after the trusty pulled the garbage out and closed the door back and turned the key he was holding the door where it would look like it would be locked but it wasn't. They said they waited—he said they waited a few minutes after the trusty left out of the jail, went out of the jail door back to the fire escape door and over the fence and left Quitman getting into the woods going south down the railroad tracks.

Q Did you ask him any other questions pertaining to where they went after they escaped jail?

A Yes, sir. Then I asked him what they did after they got out of town into the woods. They advised that they walked in the woods all night and the next day he said Dyess told him he knew the area well below Quitman and said while they were walking in the woods they came upon a person turkey hunting. They stopped and talked to him a few minutes and—you know—continued on walking until they came out of the woods at the edge of a field where they came up on a trailer and Dyess told Minnick that he knew the trailer would have some guns in it. At that time they went to the trailer and went inside. He said after they were inside the trailer taking the guns they heard a vehicle drive up and looked out

and seen two men and a young child outside. They said the two men and child stayed outside a few minutes and when they started walking to the back of the trailer they jumped out the back door and Dyess shot one of the men in the back with a shotgun and then shot the same person in the head with a pistol, gave Minnick the pistol and made him shoot the other man in the head with the pistol. He said after this happened they started to pull the bodies in the gully behind the house and two girls drove up. When the two girls drove up they brought them into the house and tied them up. After tying the girls up and taking the weapons in the house they left in a silver Ford truck which belonged to one of the victims.

Q Now, did they tell you as to what Dyess wanted to do to the girls?

A Minnick said that Dyess wanted to kill the girls or rape them. Said it was all he could do to keep Dyess from raping or killing the girls.

Q Did he advise you as to any money he got?

A Yes, sir. He said that they took approximately a hundred and twenty-one dollars from the bodies of the two men.

Q Did he say where they went?

A After they left there in the truck they traveled to New Orleans and once they reached New Orleans they went to a person that Dyess knew down there and sold him some of the guns they took out of the trailer to this person. They stayed in New Orleans for a while at the Star Light Motel. After leaving New Orleans went to Brownsville, Texas and then over into north Mexico. He said at that time he and Dyess got into a fight and he was able to get away from him and at that time he traveled on to California.

Q Did he state whether or not Dyess tried to kill him?

A Yes, sir. He said that they got into a fight and he was able to get away from him. He also said concerning the pistol—I asked him about the pistol and he said he threw the pistol in a garbage can in New Orleans.

Q When Minnick and Dyess broke up did he state what type of fight they had?

A Just that they had gotten into a fight. He didn't indicate for what reason.

Q Now, did he tell you how he got to California?

A By hitchhiking.

Q What did he say he did in California after he got there?

A Once he got to California he got in contact with a friend of his that he used to be buddies with in Gadsden, Alabama and was living with him and after reaching California he obtained a California driver's license and birth certificate under the name of David Bruce Prokaska and had a voter registration card to match that, also.

Q Was this a written statement or an oral statement?

A It was an oral statement that I wrote down what I remembered after I left him in the jail.

Q And, did you make notes pertaining to what Minnick had said to you in San Diego?

A Yes, sir.

Q Is that in Exhibit 3?

A Yes, sir.

Q And, are those the original notes?

A Yes, sir.

Q At any time did Mr. Minnick request an attorney?

A No, sir. Not during the time I was talking with him.

Q At any time did you make any promises to him?

A No, sir.

Q Did you threaten him in any way?

A No, sir.

Q Now, pertaining to Mr. Minnick how long did this interview last?

A Somewhere in the neighborhood of forty-five minutes to an hour.

Q How did you conclude the interview?

A That—you know—I was through talking to him.

Q Did you leave the room at that time?

A Yes, sir. And, the people in the Sheriff's Department took him back to his cell.

Q Now, pertaining to Mr. Minnick prior to this occasion was this the first problem he ever had with the law?

A No, sir.

Q What is his prior record?

A Here in Clarke County he had been arrested previously for armed robbery charge.

Q Had he been convicted of that charge?

A Yes, sir.

Q And, during the investigation of that case were you the investigating officer?

A Yes, sir.

Q And, in fact, you had informed him of his rights here in Clarke County, haven't you?

A Yes, sir.

Q On previous occasion. Had he had a record from California?

A Yes, sir.

Q What was that record?

A Armed robbery and assault charge.

Q And, he was convicted of that felony and received a penitentiary sentence there, also, didn't he?

A Yes, sir.

Q So, his prior background was that he was familiar with the Miranda Rights, wasn't he?

A Yes, sir.

Q Now, directing your attention—

BY MR. GATES: I object to that statement from the District Attorney that's a conclusion of the witness.

BY THE COURT: Be sustained.

Q After this day did you continue to be in San Diego, California?

A Yes, sir.

Q How often did you see Mr. Minnick?

A I did not see him again until after he had signed a waiver to come back to Mississippi voluntarily. He was brought back by myself and Deputy Robert Owen.

Q You're telling this Court he waived formal extradition and came back freely and voluntarily?

A Yes, sir.

Q And, that was down at the San Diego court?

A Yes, sir.

Q Once on the airplane did you continue to talk to him about what occurred?

A He would talk on and off to myself and Deputy Owen.

Q Did you try to commence any type conversation concerning the murder investigation on the airplane?

A No, sir.

Q Do you recall anything that he said to you on the airplane?

A There was something said concerning that he and Dyess would have been okay if they had been like Jesse James and split the money evenly but he didn't do him right and that's what he got mad at Dyess about.

Q Is that all you recall that was said on the airplane pertaining to the murder?

A Yes, sir.

Q And, when did you arrive back in Mississippi?

A On the 29th.

BY MR. WRIGHT: The Court's indulgence.

Q When you interviewed the defendant Minnick did he appear to understand what you were talking about?

A Yes, sir.

Q Could you communicate and you understand what he said and he understand what you said?

A Yes, sir.

Q How old was he at the time of the interview?

A Twenty-two or something like that.

Q Did he appear to be mentally unstable?

A No, sir. He understood what we were talking about.

Q In fact, he freely and voluntarily waived extradition to come back some three days after the interview?

A Yes, sir.

BY MR. WRIGHT: No further questions.

BY THE COURT: Cross examination

CROSS EXAMINATION BY MR. GATES:

Q Are you familiar with this whole case?

A Yes, sir.

Q Did you know he was interviewed before—after being arrested in California?

A Did I know that at this time or—at which time did I—

Q You know it now?

A Yes, sir.

BY THE COURT: What was that question?

BY MR. GATES: That he was interviewed in California before Mr. Denham interviewed him.

BY THE COURT: By some law enforcement officer from Mississippi?

BY MR. GATES: No. I think it—I believe it was somewhere else.

Q Do you know, though?

A It was from the FBI in San Diego.

Q San Diego police or the FBI in San Diego?

A San Diego FBI.

Q Okay. Are you—do you know that he was arrested by a SWAT team?

A Yes, sir.

Q Do you know if he was roughed up when he was arrested?

A No, sir.

Q You don't have any information that he was roughed up when he was arrested?

A None was indicated to me.

Q Do you know that he—did you know that he never talked to a judge in between the time when he was arrested and the time he talked to you?

A Did I know that?

Q Yes, sir.

A No, sir.

Q Do you have any information to think he would have an opportunity to speak to a judge before you interviewed him?

A I don't know. I arrived there Sunday night and talked to him Monday.

Q When you talked to him did you say something to the effect, "I'm not wired."

A He asked me if I was recording anything and I said I didn't have a recorder or anything on.

Q He didn't sign a waiver of rights.

A He said he would not give me a signed statement.

Q He didn't sign the statement you prepared?

A No.

Q Did you offer that to him to sign?

A I asked him but he refused to give a signed statement.

Q Okay. Did you know that when the FBI man interviewed him at one point he stopped and asked to speak to an attorney?

A No, sir. I wasn't present when that interview took place.

Q Okay. Did you have information in your possession or that you know of to that effect?

A I would have a copy of the interview that the FBI conducted.

Q Does that not reflect that at one point he asked the FBI man—said he wanted to speak to an attorney?

A I don't know. I don't have it in front of me.

Q Okay. To your knowledge, did he interview any other persons other than the FBI?

A Repeat the question.

Q Was he interviewed by any other person other than the FBI and yourself?

A Not to my knowledge.

Q Do you know how many people were present when the FBI man interviewed him?

A No, sir.

Q Do you know whether or not he signed a waiver or rights when he was interviewed by the FBI man?

A I was not present when the interview took place.

Q As far as your information that you have do you have any information showing that he ever signed a waiver of rights in connection with making a statement?

A I do not know.

Q You don't know anything about what the FBI man said to him when he was interviewed by the FBI man?

A It would only be the information received by reading what the interview consisted of.

Q Do you know that he was detained in jail from the time he was arrested until the time you got there?

A He was incarcerated. Yes, sir.

Q And, do you have any reason to think he had an opportunity to speak to a lawyer between the time he was arrested and the time you interviewed him?

A I do not know.

Q Was he kept in the same jail to your knowledge from the time he was arrested to the time you interviewed him?

A I do not know.

Q Do you know anything about the circumstances of his detention?

A No, sir. He was in the San Diego County Jail, central lockup in San Diego cell when I arrived there.

Q Would you look at that and see if you can identify it?

BY MR. WRIGHT: May I see what you're handing the witness?

(Mr. Gates shows item to Mr. Wright.)

Q Is that FBI—is that your information about the—is that information the same thing you have about the FBI interview?

A Yes, sir. Yes, it is.

BY MR. GATES: I will offer this.

BY MR. WRIGHT: The State doesn't object to it as being a report from the FBI that was in the possession of the Sheriff's office, which I furnished to defense counsel but as to the hearsay aspect of it the State does object to it.

BY THE COURT: Well, I will let it be marked and made evidence for the purpose of my ruling on your motion to suppress the statements.

(ITEM IS RECEIVED AND MARKED AS EXHIBIT NO. 4 INTO EVIDENCE, AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE NO. ____ [*blank in original*], AND IS MADE A PART OF THIS RECORD.)

BY MR. GATES: That's all the questions.

BY MR. WRIGHT: No further questions.

* * *

Excerpt from Trial Transcript
(Testimony *in limine* of Robert S. Minnick) (Tr. 319-37)

ROBERT MINNICK

called as a witness, and having been previously sworn, testified as follows:

DIRECT EXAMINATION OF MR. GATES:

BY MR. GATES: I'm not wanting him to testify as to the substance of the statement, if any, but just as to what happened before it was made.

BY THE COURT: Ask him any question you like.

Q Would you state your name?
A Robert Samuel Minnick.
Q Okay. Do you recall the circumstances of your arrest in California?
A Yes, sir.
Q Okay. Where were you when you were arrested, what town?
A Lemon Grove, California.
Q What were you doing at that time?
A Getting out of a truck. Just getting off from work and in a grocery store parking lot where we parked the truck.
Q What occurred?
A I walked around the front of the truck and two men dressed in civilian clothes with a badge in their hands pulled a .357 Magnums on me and and hollered at me which was—I didn't understand why—what they said because they shocked me to see the guns pointed at me and I immediately turned and ran and they chased me a block and tackled me on a gravel ground and beat me in the back of my neck and my back to where it caused me severe back pain for about four months afterwards. They carried me back across the street to where several other officers come around and they made very rude accusations toward me as being a southern hillbilly murderer and that I should have part of my—pardon the vulgar language—but I should have my nuts cut off and that they

should take me out and kill me and throw me in a ocean somewhere. As I was trying to tell a man named Dave to tell everybody else goodbye at the house they slammed my head down on the back of the trunk of the car. At that time one of them asked me was I Robert Minnick and I stated the name that I had papers for and he jerked my arm—my left arm—around behind me to where it hurt me severely and should have broke, I think—to look at the tatoo on my left arm and he said, "Yes, this is Robert Minnick." And, they carried me—they put handcuffs on me and several of them kept coming by and squeezing them tighter on my wrists and they carried me to Lemon Grove city jail.

Q Excuse me. But, do you recall any of these police officers names or did you—

A I was not able to see or get an answer from any of them as far as the names.

Q Do you know who they were police for?

A The Lemon Grove Police Department to the best of my knowledge. As we arrived at the Lemon Grove Police Department they took me in a small holding cell and literally slammed me against the wall and squeezing tighter on the cuffs and talking all kind of obscenities to me which I don't recall the full extent of them but they were getting pretty bad. And, one of them, which I don't know punched me in the back a few times and made my back pain even worse than they were. And, then they left out of there and locked the door and they went and searched through my personal property and I noticed a couple of things in there that were of value one of the officers put in his pocket—which I don't know.

Q How big was the holding cell?

A About as big around as this place right here where I'm sitting—square.

Q How long were you in there?

A Just long enough for them to get two other prisoners and go through my property I had extensively—I mean, pardon me—three other prisoners. They put the four of us in the back of a Lemon Grove Police Department car which was cramped and they kept on squeezing on our handcuffs and I

kept asking them to take them off and they just kept squeezing. We drove to San Diego County Jail—

Q Did other persons go with you?

A There was three other people, three other prisoners, in the car and two police officers in the front. We drove to the San Diego County Police Department and as arriving there a person being brought in to be booked goes in downstairs into a small holding area until their names and everything is got from them and then they go into a little bit larger holding area with some fifteen or twenty people in there. They kept us in there until they took us—several of us into the next room and strip-searched us and they carried us—carried several of the inmates there upstairs to a holding cell and they carried me around to a separate single holding cell and made several accusations and was trying to coerce me into talking to them about the charges they said I had placed on me.

Q How many men were present at that time?

A There were two officers present in the holding cell with me at that time.

Q Were they armed or unarmed?

A They were unarmed because no officer was allowed to carry a gun but they did have their sticks on their belt.

Q How long did they talk to you?

A Not very long. I don't know exactly because I wouldn't tell them nothing and I didn't look at them. I didn't say anything to them at all because I was made to understand beforehand that the San Diego Police Department was not very nice.

Q How big was the holding cell?

A Regular size holding cell, 10×10 or 12×12, something like that. They then carried me upstairs to the cell area and put me in a cell up there with several other inmates which were already sentenced county prisoners. I can't recall the exact date—I was there from 8/22 to 8/29, which was one week exactly—sometime within the first two or three days several officers come to talk to me. Two of the officers called theirselves FBI agents and I told them immediately that I did not have a lawyer and that I needed to have a lawyer sitting with me. They run off a whole slew of different things about

the charges on me, about the extent of what was going to be done to me physically as being hurt along the way and possibly killed on death row at a later day and that it was nothing that I could do about it no kind of way.

Q How long had you been in the cell or the jail before the officers came to talk to you?

A I'm not sure exactly but as I stated I believe it was two or three days they come—it might have been the second day that I was there. It was fairly quick after I arrived there.

Q Okay. Before they came had you talked to a judge?

A No. I hadn't talked to anybody. I had requested a lawyer immediately I got there and I was told that I wouldn't be able to be appointed to a lawyer until court session was run and I would be carried upstairs and it would take a day or so to get ahold of a lawyer and wouldn't be able to talk to him until the day after that I was appointed one. Which I don't know the exact date when they carried me up there but it was some four or five days after I was there and the lawyer told me not to talk to anybody. And, after several officers had already talked to me he made—he had requested of the judge and strict court order that no officer outside of the San Diego Police Department be able to confer with me at all, which I related to the FBI officers and, also, Officer Jim Denham and also the San Diego fugitive corps—or whatever that meant. There was one man from that organization and they told me that didn't mean nothing that they were going to talk to me anyhow. Back to sitting with the FBI men for the first time, they—

Q Let me ask you this. Did you say that you had talked to a lawyer before you talked to the FBI?

A No. I had not talked to no lawyer before I talked to the FBI people and I told them that I wanted a lawyer and I would not sit and talk with anybody without a lawyer and that I wasn't signing any papers, no waivers, no rights, waivers, anything, I wasn't signing anything and I was not going to talk to them and they set and drilled me on questions more of where Monkey Dyess was at and where I left him and slightly on the charges pending me now.

Q What about this order that you talked about about nobody but the San Diego police, when did that happen?

A When—the day after I was appointed the lawyer if I'm not mistaken, he told me—he did drill me on had I talked to anybody or has anyone, officer or organization come to talk to me about my charges. He told me not to talk to nobody and that when he went in the next time to the court he was going to get a court order showing that no officer outside the San Diego Police Department could converse with me. The following day he advised me that this court order was in effect and that anybody that come to talk to me that I was not to go talk to them. When the officers did come to talk to me the San Diego jailers came up to the cell and got me out. They had a paper in their hand saying who it was to visit me and what organization they was from. And, on the first side of the paper reading the FBI I refused and they made me go down anyhow. They didn't physically force me but they told me I was going to have to go down or else. Nothing else. On the arrival of Jim Denham they told me that I was going to have to go down there and talk to him because he was the man that was coming up to extradite me back to Mississippi and that I would have to talk to him, that I could not refuse and so I went and talked to the different people at different periods of time.

Q When you talked to the FBI man did you ever—was there more than one FBI man or do you know?

A There was two FBI officers and the one that was—they were facing me—the one on the left of me on the table was trying to be nice and compassionate, per se, and the one to the right of me started getting voicely violent, making threats of, "We'll make things very hard on you. We have hands everywhere and things can be really rough for you along the line unless you contend to what we want you to tell us." And, at that time they started filling out waiver of rights paper and, also was reading my rights to me and I told them to stop writing because I wasn't signing anything for them and that I did not have a lawyer yet and this is when the FBI officers talked to me the first time. And, they started—they brought out composite drawings, one of myself and one of

Monkey Dyess, and asked me was that me and I said that it wasn't a very good picture and they had—they had no physical pictures at all. All they had was one composite drawing of myself and one of Monkey Dyess. And, then they went to drilling me on questions of the murder scene because they already had several facts of what they called happened at this murder scene.

Q What did you say in response to those questions?

A I did tell them that I escaped from the Clarke County Jail and I told them that we left there and got on the railroad tracks and Monkey Dyess said he was going to Shubuta and I told him that I wasn't going to Shubuta with him and from there he went our own separate ways and I ended up on Interstate 59 headed toward New Orleans and went from there to California and I stayed on the east side of California for two weeks when I first got there at some friend's house and then later got to San Diego, California and pretty much stayed on the street for the first two months or so and was doing—I had a couple of odd jobs working with a fellow doing landscaping and janitorial service.

Q Did you ever ask to stop talking to the FBI man?

A As I was saying, they drilled me on several questions of the incident and I told them about leaving the jail and that's all I told them. I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing any rights waiver or I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.

Q What was your lawyer that you talked to—name?

A I don't recall his name.

Q How long did you talk to him?

A I talked to him two different times and—it might have been three different times—but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and that he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police—I advised him of

the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department. And, the next day he showed me—well, he didn't show me—he had papers in his hand and he told me he did have the court order that I was not to talk to any police officer—or he recommended somehow or another through the court from them doing so and as of going into the room with the different officers they told me that lawyer wasn't nothing—that's their words—and that the paper didn't mean nothing, that I had to talk to them.

Q What was your state of mind when you talked to Mr. Denham?

A My mind—I was extremely on the edge, very ragged tempered at the time, and to be pinpointed severely upset through the ordeal because my physical and mental anguish placed on me by different police officers had caused me to retract into my inner person at that time.

Q What, if any, type of promises did he make to you?

A No one made any promises except they told me if I went along with them they would sure stand up in court and tell the court that I helped them out and please show mercy on me.

Q Who made that statement?

A The FBI made the statements about—and—just the FBI made statements to that. Also, when the FBI come to see me at Brandon and you was with me they also made the same statement, per se. And, I told them I wasn't telling them nothing because I had nothing to tell them and they left.

Q What, if any, promises did Mr. Denham make?

A We went through a hair-wired number of different conversations over past escapes. We went into minute details of the escape and if I—I'm not sure if I should correct him or not. Should I?

Q I don't understand your question.

A Jim Denham—try to correct something that he stated here on the stand. He stated that I told him about the door being pushed to and them locking it? Okay. The door was never locked at any time by anyone and it was by all means a

civilian running the turnkey at the jail, which is federally illegal.

Q But, what if any, promises did he make to you?

A He made no specific promises of any kind but told me that if I would go along with his story and help him out on this whole thing things would turn well for me in court, these are extremely severe charges and I needed every anchor that I could have to help me out.

Q What, if any, type of threats did he make?

A He didn't exactly make any direct threats but he told me things could extremely turn hard on me depending on which way, which side of the fence that I walked on. And, I told him that I had to have me a lawyer after going through minute details of the immediate escape from the jail, which we went over a time or two. If it please the Court, my statement is over and I stand on the Fifth as of now.

Q Let me ask you this. Let me ask you a question. If you don't want to answer—do you consider that this statement was voluntary or involuntary?

A I give no direct statement of any kind concerning any murder charges or anything being on the run with Monkey Dyess, nothing that is on paper which I have read. Everything is put down, I advised this, I advised that, I advised this, I advised that. They have no signature and no coercing ears that can say that I give any sort of statement of any kind freely or voluntary to any police officer for anything. I refused and I deny anything put down on paper being that I said so and so, except and excluding the immediate escape from the county jail, which I will state I fully to the best of my knowledge I did escape from the county jail. They have me dead to rights on that and there is no way around it, but outside of that time I left from Clarke County, I left from the State of Mississippi, headed directly towards California by way of several different towns that I stopped.

Q You gave no voluntary statement?

A I gave no free or voluntary statement to any officer concerning any murder charges.

BY MR. GATES: No questions.

BY MR. WRIGHT: I've got some questions on cross examination.

BY THE COURT: Go ahead and ask them.

CROSS EXAMINATION BY MR. WRIGHT:

Q Sit down and I'll ask you some questions. Now, Mr. Minnick, pertaining to your rights form, you know what the Miranda Rights are, don't you?

A That I had a right to remain silent and so on and so forth?

Q Yes.

A I have heard it spoke to me before on several occasions.

Q The truth of the matter is you've been informed of these rights on several occasions prior to August the 25th, 1986, haven't you?

A The Lemon Grove Police Department did not read my rights. The San Diego Police Department did not read me my rights. I was read my rights when I was caught on the robbery charge I have a sentence of eight years in Campier, Louisiana by one officer and no other. And, I believe I was read my rights after I arrived at the county jail by Robert Owens or Jim Denham, one of the two. I was read my rights by the FBI agent in San Diego County Jail and I was read my rights by the FBI agent in Pearl, Mississippi—Brandon, Mississippi, whichever of the two. And, Jim Denham, also did not read me anything. He had no paperwork at all but he, per se, recited my rights to me and I directly spoke to him and told him that I was refusing to sign anything about anything and I was not waive any rights and at that time I had told them I was not going to sign extradition but after seeing that lawyer and their full case load I thought there is no reason for me to stay here in California when this is going to come up sooner or later. I'm sure would have went through and I didn't see any reason to fight extradition so I signed it so the law here in Clarke County could go ahead and bring me here to Clarke County, Mississippi.

Q Deputy Denham did inform you of your rights, didn't he?

A I can't recall exactly what he said but he recited something he called rights to me and I was not able to read anything of rights waiver or any—you know—because he had no paperwork whatsoever.

Q You stated to him you refused to sign a waiver of rights but you were willing to talk to him, didn't you?

A Not exactly those words. I told him—well, actually it was nothing official at all and there weren't no statements official from him in any kind of way. We went through several different conversations about—first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail and I deny his remark saying that I had stated that it was ever any kind of premeditation. It was an instant, spontaneous thing that happened for my person and the incident with the door being pulled to without ever being locked it went down several months beforehand on the trusties just strickly to see if it could be done as a trick on the trusties and it was immediately corrected.

Q And, then you got into what happened when Lafferty and Thomas were killed, didn't you?

A I have no comments on that and I stand on the Fifth Amendment.

Q And, at no time did Officer Denham beat you in that interview, did he?

A I have no comment on that and I stand on the Fifth Amendment.

Q At no time did he threaten you in any way, did he?

A I have no comment on that and I stand on the Fifth Amendment.

Q At no time did he make you any promises of leniency, did he?

A I have already stated something to that effect and it's on the record and if it please the Court and Your Honor, I

refuse to answer anything else from the D.A. and I stand on the Fifth Amendment.

BY MR. WRIGHT: If it please the Court, Your Honor, he does not have that right simply not to answer questions on this motion. He cannot take the stand and give a self-serving statement and then not allow me to cross examine him within the purview of the rules.

BY THE COURT: Cross examine him all you like, but he might not answer.

Q You don't always tell the truth, do you, Minnick?

A I will answer that and I have propounded myself to the best of my knowledge all my life as from turning a middle-age teenager up to now as to doing my best to keep from lying to anybody—

Q What have you been previously convicted of, Mr. Minnick?

A I have—you have that on record, thank you.

Q No. You answer the question. What have you been previously convicted of?

A I was convicted of assault with a deadly weapon—

BY MR. GATES: I object to that. I don't see how it relates to this motion—

A It don't have anything related to this motion.

BY MR. WRIGHT: Proper impeachment, Your Honor. He's making certain statements under oath. I have a right to impeach him as to his truthfulness.

A Okay. That's fine. I'll answer it. There's no problem with that. It's all on record. I was sentenced to three years state time in the State of California for ADW, which is assault with a deadly weapon, which was a plea of guilty to a lesser charge because the lawyer I had was not any good. After arriving at prison and studying law for my own person in the law library, I found I could have answered that, stand in court and prove me in front of a jury, five stab wounds—what he called five stab wounds—he could not have done it

and him and his lawyer and doctors which was on the statement of the court would have sentenced to thirty years minimum time in the State of California for perjury in the United States Court.

Q What else were you convicted of?

A I was convicted of robbery in Clarke County, Mississippi which was also a plea to a lesser charge, which I got it down to eight years through my lawyer on motion which could have gotten it down more, I believe. Also, with the agreement that Robert Glass, which was a friend of mine that happened to be with me would be cut loose completely from—

Q What about Camery, Louisiana? What were you convicted of there?

A Campier, Louisiana?

Q Yes.

A I've been convicted of nothing there. That's where they caught me in the, per se, man's car that's supposed that Robert Glass and I stole at Enterprise down here in Clarke County on the interstate.

Q The truth of the matter is you know what your rights are and you are informed of your rights and you understood your rights, didn't you?

A I understood my rights and that's exactly why I told them that I wanted a lawyer and they was getting no kind of anything out of me for anything except when I talked to Jim Denham and stated the exact moment and the happenings of the escape from the Clarke County Jail.

Q But, you continued to talk on to Mr. Denham about what happened in the murder, didn't you?

A You only have that down on paper. I'm denying that completely. I have already denied what he has down on paper because it's written up as "Robert Minnick advised so and so, Robert Minnick advised so and so", and there's no—nothing of anything to go along with it especially a signature and it states in one of the Mississippi law books that if one person does not freely and voluntarily give a statement to an official it is completely inadmissible—

Q Mr. Minnick, you're saying that you didn't even give the statement. Which is it? Did you give the statement or did you not give the statement?

A No comment. I stand on the Fifth.

Q The truth of the matter is Mr. Denham at no time made any promises to you, did he?

A Hold on now. I'm not on trial here as of yet. This is for a motion.

Q Now, wait just a second, Mr. Minnick. I ask the questions. It's your duty to respond to the questions. You can answer the question. I'm not going to batter around questions and answers.

A That's fine. I stand on the Fifth.

Q The truth of the matter is you never told him at that interview that you wanted a lawyer, did you?

A Yes. I did. Very much so.

Q Now, Mr. Minnick, which is the truth? What you're saying now or what you said when your lawyer asked you questions, because you never one time said that you told Denham that you wanted a lawyer. Are you lying now or are—

A I'm saying right now—

BY MR. GATES: I object to the form of that question.

A The reason that I did not—

BY THE COURT: Wait just a minute. Overruled. Go ahead.

A The reason I did not sign any waiver of rights is specifically I wanted a lawyer and it's already down on the stenographer's paper here.

Q You never told that to Denham, did you?

A I don't comprehend the question. I stand on the Fifth.

Q In fact, Mr. Minnick, you thought that just simply because you refused to sign the waiver that nothing could be used against you and you just went out and confessed to the whole crime.

A I stand on the Fifth. As of here now—

Q Did you go to the doctor for all the injuries that Denham caused you after you left the interview room?

A I never said that Denham caused me any physical injuries, never at one time did I state that. And, yes, as arriving at the prison I did seek medical attention for my back problems being physically hurt by several of the police.

Q You weren't scared of Denham, were you?

A I stand on the Fifth. That's an illogical question. Anything else that you have to say I'm going to stand on the Fifth, Mr. D.A.

Q You decided you don't want to testify now—

A I stand on the Fifth.

Q Now, Mr. Minnick, the truth of the matter is that Denham never made any promises, did he?

A I stand on the Fifth.

Q The truth of the matter is that Denham never hurt you in any way, did he?

A I stand on the Fifth.

Q The truth of the matter is Denham informed you of your rights and you understood your rights.

A I stand on the Fifth.

Q The truth of the matter is that after informing you of your rights you said, "I refuse to sign anything, but I'll talk to you."

A I stand on the Fifth.

Q The truth of the matter is you explained how you escaped and how you and Dyess committed the murders of Lafferty and Ellis Thomas.

A I stand on the Fifth.

Q The truth of the matter is that at no time in that interview did you ask for a lawyer.

A I stand on the Fifth.

Q You're not scared of Denham, are you?

A I stand on the Fifth.

Q The truth of the matter is after that you waived extradition and signed a waiver of extradition, didn't you?

A I stand on the Fifth.

Q I now hand you a waiver of extradition and ask you if you waived extradition.

A That's already been stated on the stenographer's paper. I stand on the Fifth.

Q Is this a copy where you signed and waived extradition?

A I stand on the Fifth.

Q And, didn't you have an attorney at that time?

A I stand on the Fifth.

Q And, Denham didn't make you sign this, did he?

A He wasn't even there. I stand on the Fifth.

BY MR. WRIGHT: If it please the Court, the State moves to have this made the next numbered exhibit.

BY THE COURT: Next lettered exhibit?

BY MR. WRIGHT: Next numbered exhibit.

BY THE COURT: All right.

(ITEM WAS RECEIVED AND MARKED AS EXHIBIT 5, INTO EVIDENCE, AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE ____ AND MADE A PART OF THIS RECORD.)

Q The truth of the matter is Mr. Denham didn't ever tell you to go along and get some help, did he?

A I stand on the Fifth.

BY MR. WRIGHT: No further questions.

(WITNESS EXCUSED)

BY MR. GATES: I don't have any other witnesses.

BY MR. WRIGHT: The State recalls Mr. J. C. Denham.

Excerpt from Trial Transcript (Testimony *in limine* of Deputy Sheriff J.C. Denham) (Tr. 338-39)

J.C. DENHAM

called as a witness by the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. WRIGHT:

Q Mr. Denham, did you ever make any promises to the defendant, Minnick, to encourage him to make a statement?

A No, sir.

Q Did you ever tell him to go along—if he goes along that you might be able to help him turn out for him in court?

A No, sir.

Q Did you ever make a direct threat to him?

A No, sir.

Q Or, indirect threat to him?

A No, sir.

Q At any time did he ever ask for a lawyer during that interview?

A No, sir.

Q Did he give you the statement, basically, you said on direct and the substance of what your notes reflect pertaining to the murder?

A Yes, sir.

BY MR. WRIGHT: No further questions.

BY THE COURT: Did any of the people in California that you talked with say that the defendant wanted an attorney or advised that he would have an attorney?

A They advised that he would have an attorney with him during the extradition period whenever one would be needed.

BY THE COURT: All right.

CROSS EXAMINATION BY MR. GATES:

Q Do you know whether or not an attorney had been appointed for him?

A No. I don't.

BY MR. GATES: I believe that's all.

BY MR. WRIGHT: State rests.

(WITNESS EXCUSED).

BY MR. WRIGHT: Your Honor, the officer that Mr. Gates wanted is here—to call to the stand. Do you know his name?

BY MR. GATES: Kenneth Cross, I think.

BY THE COURT: All right. When you examine him I will rule on this motion to suppress statement made by your client Robert Minnick.

Excerpt from Trial Transcript (Trial Testimony of Deputy Sheriff J.C. Denham) (Tr. 929-40; 945-46)

* * *

Denham—direct

Q All right. At that period of time did you ask for any additional assistance in New Orleans?

Q What occurred in August?

A Received information from the San Diego County Sheriff's Department of their arrest of Robert S. Minnick.

Q What did you then do?

A I then traveled to San Diego, California where I talked with Mr. Minnick and he was arrested on the 22nd of August. I interviewed him on August the 25th.

Q And, based on your information did you perfect the arrest on August the 22nd?

A Yes, sir.

Q Who made the actual arrest in San Diego, California?

A The sheriff's deputies out there.

Q How long did it take you to get from Clarke County to California?

A I was notified the 22nd and I arrived out there late on the 24th.

Q Did you see Mr. Minnick in San Diego?

A Yes, sir.

Q On what day?

A August the 25th.

Q Where did you see him?

A At the San Diego County Jail.

Q Was he incarcerated?

A Yes, sir.

Q And, whereabouts in jail did you see him?

A In a plain viewing room inside the jail.

Q Do you see the same Robert Minnick here in this court room?

A Yes, sir.

Q Would you point him out?

A To my right. The first one at the table to my right.

Q What color shirt does he have on?

A Blue denim jacket shirt.

BY MR. WRIGHT: Let the record reflect he identified the defendant in the presence of the jury.

Q Now, Mr. Denham, when you saw Mr. Minnick what did you do?

A First I advised him of his rights.

Q I now hand you two exhibits of 2/3/87, Exhibit 2 and Exhibit 3. I'm going to back up. At the time you first saw Mr. Minnick had you had any contact with the FBI in San Diego?

A No, sir.

Q When you contacted Mr. Minnick what type of room were you in?

A Interview room with glass around the top portion of the room.

Q Was anybody else present?

A No, sir.

Q Would you describe the condition of Mr. Minnick at that time?

A He was able to talk to me and understand—you know—what I wanted to talk to him about.

Q Did you inform him of his rights?

A Yes, sir.

Q Would you demonstrate exactly how you informed him of his rights to the jury?

A It's a form I read to the person, and I can read the form.

Q Do you have that form?

A Yes, sir.

Q Do you have the exact form you used on that day?

A Yes, sir.

Q What exhibit number is that?

A Exhibit 2.

Q You can use that to refresh your memory.

A Okay, this is a form reading from the form, "Before we ask you any questions you must understand your rights. You

have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." He refused to sign the rights form. He advised me though that he would talk to me about what happened.

Q Did he state whether or not he understood his rights?

A Yes, sir. He did.

Q And, did you document that on your form?

A Yes, sir.

BY MR. WRIGHT: Please the Court, the State moves to have that admitted as the next numbered exhibit.

BY THE COURT: If there's no objection let it be marked Exhibit 39 and made evidence.

BY MR. GATES: We renew our previous objection to the alleged statement.

BY THE COURT: Sustained. You can't just sit there. I know you are able lawyers, both of you. I don't see how you can expect me to read your minds.

BY MR. WRIGHT: Then, the State requests that it be marked for identification only.

BY THE COURT: That's the status of it. It will be marked Exhibit O for identification only.

(ITEM WAS RECEIVED AND MARKED EXHIBIT O FOR IDENTIFICATION ONLY, AND IS INCLUDED IN THE SEPARATE EXHIBIT VOLUME AT PAGE E-101, AND MADE A PART OF THIS RECORD.)

Q Now, Deputy Denham, once you informed him of his rights what did Mr. Minnick say?

BY MR. GATES: Again, I renew my previous objection, Your Honor.

BY THE COURT: Overruled.

A To begin with I asked him how they got out of our jail. He then told me how that took place.

Q What did Mr. Minnick say?

A He said that on Friday night, which was April the 25th, they waited until after the supper meal was served and when the trash was going to be collected out of the cell, when the guy came back to take it out they held the door to where it would appear that it was locked when he locked it and after he pulled the trash out and pushed the door back and turned the key, he held it where it couldn't lock. Upon the guy leaving out of the jail back there he and Dyess then left, went through the fire escape door and over the fence.

Q Now, at this point in time did you ask him any other questions?

A Concerning the jail I asked him if anyone else was involved in their escape and he said no.

Q And, did he tell you who escaped with him?

A James Dyess.

Q Did you question him further?

A Yes sir. I asked him what happened after they got outside of the jail that they—he then told me they left outside of Quitman, got into a wooded area and went south toward DeSoto, this being an area that James Dyess was familiar with.

Q Did he say how long it took them to get down into the DeSoto Community?

A He didn't say how long a time.

Q In relationship to Quitman, where on this map—where is Quitman on the map?

A Here—

Q Speak up.

A Here in the center of the map.

Q And, show me where the DeSoto Community is on the map.

A About five miles directly south on Highway 45 south of Quitman.

Q Did you continue to ask him any questions?

A Yes, sir. He stated after they went into the woods they traveled along and came upon a turkey hunter the following morning. After talking with the turkey hunter a few minutes they then continued on and came to a clearing where they had seen a trailer out in an open field.

Q Did he tell you what day this was?

A It would be the following day, the 26th.

Q All right. Did he continue to tell you what happened?

A Yes, sir. He said when Dyess seen the trailer he told him there would be some guns in the trailer. At that time they went to the trailer and went inside of it. He said once they got inside the trailer they found some guns and started collecting the guns up when they heard a vehicle drive up and he saw two men and a small child get out of the vehicle. He said the two men and the child stayed outside in the yard a few minutes and then they started coming toward the trailer and then Dyess and he jumped outside and at that time Dyess shot one of the men in the back with a shotgun.

Q Now, who told you that Dyess shot one of the men in the back with a shotgun?

A Robert Minnick.

Q Did he continue to tell you what happened?

A Yes, sir. He said then that Dyess went to the man and shot him in the head with a pistol. He then came back to where he was, gave him the pistol and told him to shoot the other man.

Q What did he say he did?

A Minnick then said that Dyess was holding a gun on him and he then shot the other man with a pistol two times.

Q Did he tell you what type of gun that he was saying that Dyess was holding on him?

A A small caliber—he said Dyess was holding a shotgun on him.

Q Did he tell you what type of gun he used to shoot the other man?

A A small caliber pistol.

Q Did he tell you what he then did?

A Yes, sir. He said that after both of the people had been shot they put the two year old child on the sofa in the trailer and at that time a vehicle drove up with two girls in it. He said he brought the two girls into the trailer and tied them up. He said while he was tying them up Dyess was telling—or it was all he could do to keep Dyess from trying to rape or hurt the girls.

Q Did he state who drug the bodies to the gully?

A He said Dyess drug them back to the gully.

Q What else did he say concerning the inside of the trailer and the two girls?

A He said after he tied up the two girls they collected up the weapons inside the trailer and then went outside and left in the silver pickup truck.

Q Now, while on the inside of the house how long did he say he was on the inside of the house with the two girls?

A Just a few minutes.

Q Did he state what they did then?

A He stated after leaving in the vehicle they then went to New Orleans. Upon reaching New Orleans they contacted—Dyess got in touch with a friend of his that he had known down there some years and at that time they sold some guns that came from the trailer to this man.

Q Now, directing your attention to the trailer did Mr. Minnick state anything concerning money?

A He said that approximately a hundred and twenty-one dollars was taken from the bodies of Thomas and Lafferty.

Q Did he state to you how long it took to get to New Orleans?

A No, sir.

Q And, when they arrived there tell me exactly what he said happened in New Orleans.

A He said once they arrived in New Orleans Dyess went and met the guy that he had known previously there and they sold some weapons that belonged to Thomas and Lafferty to this man.

Q Did he state where they stayed?

A He said they stayed for a period of time at the Sky Light Motel there in New Orleans.

Q Now, concerning the .22 caliber pistol did you ask him any questions concerning that pistol?

A Yes, sir. I asked him what happened to the pistol and he indicated to me that he threw it in the trash there in New Orleans.

Q Did he tell you anything else?

A He said after they stayed in New Orleans for a period of time they then caught a bus to Brownsville, Texas, then crossed the border over to Matamoros, Mexico.

Q Did you continue to ask him where they went?

A Yes, sir. I asked him what happened there and he said they stayed in Mexico a couple of days until he and Dyess got into a fight. He said he was able to get away from him at that time and then hitchhiked to California.

Q Did he state what Dyess had done to him there in Mexico?

A Yes, sir. He said he beat him and almost tried to kill him and that's when he escaped from Dyess.

Q And, concerning after Mexico did ne tell you where he went?

A: He said after leaving Mexico he hitchhiked to California and met some friends of his he had known out there previously. After meeting these friends he changed his name, got a different birth certificate and drivers license.

Q And, what name was he using?

A: David Prokaska.

Q Did you talk to him any more there in San Diego on August 25th, 1986?

A: No, sir.

Q Now, during this period of time what kind of condition was Mr. Minnick in during the interview?

A: He was able to understand and answer questions as I was asking them to him.

Q And, was he able to communicate with you?

A: Yes, sir.

Q Did you have any weapon on?

A: No, sir.

Q Did you threaten him or harm him in any way?

A: No, sir.

Q Did that conclude your interview?

A: Yes, sir. It did.

Q Did you see Mr. Minnick again in San Diego, California?

A: Yes, sir. Later during that week he was brought back by myself and another deputy to Mississippi.

Q And, did he waive formal extradition to come back to Mississippi?

A: Yes, sir.

Q And, who brought him back to Mississippi?

A: Myself and Deputy Robert Owen.

Denham - cross (Jury out)

Q And, have you also made memoranda of the alleged conversation between you and Robert Minnick that occurred in California?

A: Yes, sir.

Q Have you also previously testified to the substance of that conversation in pre-trial motion hearings?

A: Yes, sir.

Q Isn't it a fact that you did not fully state exactly the same thing as was in your previous testimony concerning the alleged statement of Robert Minnick to you in California?

A: I did not read the statement word for word. No, sir, I didn't.

Q Isn't it a fact that in the alleged previous statement there was more said about James Dyess as far as holding the gun to Robert Minnick's head?

A: I indicated earlier that Dyess held a shotgun to Minnick and made Minnick shoot the other man.

Q And, the previous testimony and memoranda does that reflect that Dyess said he would shoot Robert Minnick if he didn't do it?

A: I believe it does.

Excerpt from Trial Transcript (Refused Jury Instruction dated April 9, 1987) (Tr. 1233)

IN THE CIRCUIT COURT OF
LOWNDES COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VERSUS

ROBERT S. MINNICK

INSTRUCTION NO. ____
[blank in original]

The Court instructs the jury that in considering the evidence pertaining to the alleged statement allegedly given by Robert Minnick to James Denham, you may consider whether or not he gave a voluntary statement. If you do not find from the evidence beyond a reasonable doubt that Robert Minnick gave a voluntary statement to James Denham, you may not consider the alleged statement as evidence.

objection sustained
refused *[handwritten notations in original]*

Excerpt from Trial Transcript (Order entering conviction for capital murder and death sentence dated April 9, 1987) (Tr. 1260)

The jury has found you guilty of the crime of capital murder in Counts I-II and has sentenced you to death, and the Court accepts the sentence of the jury and it is therefore the sentence of this Court that you be transported to the Mississippi State Penitentiary at Parchman, Mississippi and that you suffer death by lethal injection in the form and manner prescribed by law and that further said execution be carried out on the 23 day of May, 1987.

/s/ L. F. WILLIAMSON
Circuit Judge
L. F. Williamson

Excerpt from Brief for Appellee State of Mississippi (page 3) on petitioner's direct appeal to the Supreme Court of Mississippi dated April 29, 1988

* * *

There is no doubt that Minnick's Fifth Amendment right to counsel had attached at the point of the interview with Deputy Denham. *Edwards* v. *Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1328 (1981). It is also evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview since warrants for his arrest had been issued. *Livingston* v. *State*, 519 So. 2d 1218 (Miss. 1988).

* * *

Opinion of the Supreme Court of Mississippi affirming petitioner's conviction and sentence dated December 14, 1988

Robert S. MINNICK

v.

STATE of Mississippi

No. DP-79.

Supreme Court of Mississippi

Dec. 14, 1988.

En Banc

DAN M. LEE, Presiding Justice, for the Court:

On September 9, 1986, Robert S. Minnick was indicted by the Grand Jury of Clarke County, Mississippi, for two counts of capital murder, one for the murder of Lamar Lafferty while engaged in the crime of robbery, and the other for the murder of Donald Ellis Thomas while engaged in the crime of robbery. Minnick was also indicted as an habitual offender on both counts. Motion for change of venue was granted, and a bifurcated jury trial was held in Lowndes County on April 6, 7, 8 and 9, 1987. The jury returned a verdict of guilty as charged on both counts; after a sentencing hearing, the jury imposed the death sentence. Minnick appeals his conviction and sentence, assigning numerous errors. We affirm.

FACTS

On April 26, 1986, around 3:30 p.m. Deputy Sheriff Johnny Hopson, Clarke County, arrived at the mobile home of Donald Ellis Thomas (Ellis) in response to a call from the Jasper County Sheriff's office. He observed a puddle of blood, a hat and some mail strewn across the yard. He also observed two young girls in the presence of a Jasper County Sheriff's deputy, Marty Thomas and Desiree (B.B.) Beech. He noticed drag marks starting at the east end of the mobile

home that led across the back yard of the mobile home, which he followed to the edge of a gully running behind the mobile home. In the gully he found two bodies. At this point, he secured the premises and called Chief Investigator of the Clarke County Sheriff's Department, J.C. Denham.

Upon being called to investigate, Denham proceeded to interview Marty Thomas, Ellis Thomas' younger sister, and B.B. Beach. Marty and B.B. drove over to Ellis' mobile home between 2:00 and 2:30 on April 26, to play in the gully. Marty drove her older sister's red car. As they drove up the driveway, a white man met them. Marty described him as short, skinny, with a shaved head, blue shirt, tennis shoes, two rotten front teeth, and carrying a pistol. The man told her to hand him the keys, get out of the car, and do as he said if they wanted to live. He marched them both to the back of the trailer, where they saw Ellis' truck, a big black man, and a body lying on the ground. Marty recognized the body as Lamar Lafferty. The black man carried a rifle or a shotgun. The white man took them inside the trailer through the back door, where they saw Brandon Lafferty, Lamar's two-year old son, sitting on the couch. The white man made them lie on the floor in the den, on their stomachs, as he tied their hands and feet behind their backs with haystring. The black man came inside and began carrying guns out of the bedroom. The white man told them four or five times to tell the police that it was two black men or he'd come back and kill them. The white man then got a pitcher of tea from the refrigerator, while the black man continued to carry out guns. Then they left. Marty and B.B. cut through the haystring around their feet with their fingernails and found a knife from the kitchen to cut their hands loose. Looking out the window, they saw no one there, and saw that Ellis' truck was gone. They took Brandon, got in their car, and went to a friend's house, where Marty called the police. The Jasper County Sheriff's Office responded first; Marty told them that two black guys had tied them up. The Jasper County deputy sheriff determined that the incident occurred in Clarke County and called the Clarke County Sheriff's Department. He then took the girls with him to the mobile home and were

met by Deputy Hopson. Marty again told Hopson that two black guys had tied them up. The girls were taken to their Uncle Marlin's house where Deputy Denham came to talk to them. When Marty found out that Ellis and Lamar were dead, she told Deputy Denham the truth—that a white man and a black man had tied them up. Upon taking Marty's and B.B.'s statements, Denham realized that the description of the two men fit the description of two escapees from Clarke County Jail, Robert Minnick and James "Monkey" Dyess, who escaped from the jail the evening before.

Denham was also able to interview Thaddis Pryor, who was turkey hunting on the morning of April 26 around the Beaver Dam community in Clarke County where his deer camp is located. On Sunday morning, April 27, having heard about the incident at the Thomas mobile home, Pryor contacted the Clarke County Sheriff's Department and related that he saw a white man and a black man on an oil lease road on foot. He approached the two men because he thought they were poachers on his camp property. He described the white man as short, skinny, pale, with a shaved head and two rotten front teeth. The black man was around six feet tall, 190 pounds, muscular build, with a short Afro. He talked to the two men for about ten minutes. Denham then met with Pryor who took him to the area where he had met Minnick and Dyess while turkey hunting. Denham was able to observe a boot print and a tennis shoe print in the area. Pryor's descriptions matched the ones given by the girls, as well as the descriptions of the two jail escapees.

The investigation pinpointed three shotguns, three rifles, a pistol, and ammunition that were taken from the trailer by Minnick and Dyess, as well as Thomas' silver Ford pickup truck. Several days after the incident, Lafferty's wallet and Thomas' checkbook were found lying along the road several miles from the Thomas trailer. Furthermore, time of the incident was established as occurring after 1:00 p.m. on April 26. Lamar Lafferty's father ate lunch with his son and then saw Lamar and Lamar's son, Brandon, leave with Ellis in Ellis' truck around 1:00 p.m. Also, Greg Thomas, Ellis' cousin and closest neighbor, heard gunshots coming from Ellis' mobile

home about 2:30 p.m. Thirty seconds later he heard another sound like a muffled shot or dud firecracker, and five minutes after that he heard two more shots which sounded like they came from a small-calibre gun. Shortly thereafter, he saw Marty and B.B. drive by in a red car.

The Medical Examiner's report indicated that Thomas suffered a close contact gunshot wound to the middle of the forehead and a second wound on the right lower back from a distance of approximately 15 feet. Lafferty suffered two gunshot wounds to the head, both close contact wounds from a small-calibre gun. The Medical Examiner's opinion was that both men were alive when their wounds were inflicted and died within a few minutes.

Denham entered the information concerning the missing guns and missing silver Ford pickup truck into the computer on the NCIC network. The truck was recovered in Florida on May 6, 1986. Apparently, the truck had been stolen from New Orleans by Paul Stanley Ward because when the truck was recovered, they found parking tickets from New Orleans under the seat. (Ward was convicted in Clarke County for possession of a stolen truck.) Denham then requested assistance from the New Orleans Police Department; however, they were not able to locate Minnick or Dyess.

On August 22, 1986, Denham received information from the San Diego Police that they had arrested Minnick. Denham flew out, arriving late August 24. He interviewed Minnick on August 25. He first advised Minnick of his rights, but Minnick refused to sign a waiver of rights form. Minnick agreed to tell him about his and Dyess' escape from Clarke County jail, but Minnick then proceeded to tell him about events after the escape. According to Minnick as told to Deputy Denham, he and Dyess walked outside of Quitman south toward DeSoto in a wooded area. They came upon a turkey hunter and talked to him early the next morning, then continued on until they came to a clearing where the Thomas mobile home was located. They decided to go into the trailer to find guns. As they were collecting the guns, a vehicle drove up with two men and a small child in it. Dyess jumped out of the mobile home and shot one of the men in the back

with a shotgun, and then shot him in the head with a pistol. Dyess handed Minnick the pistol and told him to shoot the other man. Dyess held a shotgun on Minnick until he did so. They then put the child on the sofa in the mobile home, after which the two girls drove up. They tied the girls up in the mobile home. Minnick stated that he talked Dyess out of raping or hurting the girls. Dyess dragged the bodies of the two men into the gully. They left with $121 in cash, the guns, and the silver pickup truck. They drove to New Orleans where they sold the weapons and threw the pistol in the trash. They left New Orleans on a bus to Brownsville, Texas, and then crossed the border into Mexico. Minnick and Dyess got into a fight—Dyess beat him and tried to kill him—so Minnick hitchhiked to California where he changed his name, procuring a birth certificate and a drivers license in the name of David Prokaska.

Minnick waived extradition and Denham brought him back to Mississippi to stand trial. Before trial commenced, the state was able to recover two of the guns stolen from the Thomas mobile home through the FBI in New Orleans.

LEGAL DISCUSSION

I. GUILT PHASE

A. Minnick's Alleged Statement to Denham Should Have Been Suppressed.

At pretrial hearing on motions, Minnick presented a written motion to suppress the statement allegedly given by him to Deputy Denham in San Diego, California, on August 25, 1986. That motion asserted that the statements were not voluntary and that Minnick made no knowing and intelligent waiver of his right to counsel, and that he had requested assistance of counsel.

At the hearing on the motion to suppress, both Denham and Minnick testified. Also, Minnick introduced a report of an interview of Minnick by the FBI on August 23, 1986. The FBI report shows that Minnick was advised of his rights and

that he refused to sign a waiver form. Minnick answered some questions, but then ceased to answer, saying, "Come back Monday when I have a lawyer." The FBI interviewers honored his request and ceased interrogation.

Deputy Denham testified that when he interviewed Minnick, he first read Minnick his *Miranda* rights, but Minnick refused to sign a waiver form. Denham then asked Minnick if he wanted to talk about what happened. Minnick replied, "It's been a long time since I've seen you." Then Denham asked Minnick to tell about his escape from Clarke County Jail. Minnick agreed to do that much, and then, according to Denham, just proceeded to confess to the murders. Denham left the interview and wrote up his notes concerning what Minnick said. Minnick refused to sign Denham's handwritten account of their interview. Minnick later waived extradition, and Denham brought him back to Mississippi.

Minnick also testified at the suppression hearing that he was arrested in Lemon Grove, California, by local police on August 22, beat up and carried to San Diego County Jail where he was put in a holding cell. He claimed he was not read his rights until the FBI interviewed him. He refused to talk with the FBI without an attorney.

After the FBI interview, but before Denham arrived to interview him, Minnick stated that he spoke to an attorney who told him not to speak to anyone else about any of the charges against him. When Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk to Denham. Denham read him his rights again, and Minnick refused to sign the waiver form. Minnick agreed to tell him about the escape from Clarke County Jail, and that is all he agreed to tell him. However, when questioned further about what he told Denham about the robbery and killings, Minnick refused to testify further, invoking his Fifth Amendment right against self-incrimination.

Minnick's motion to suppress the statements was overruled by the trial judge, who found that Minnick had knowingly and intelligently waived his rights. Denham could testify as to the confession, but his written notes could not be introduced

into evidence. Minnick renewed his motion to suppress at trial, which was again overruled.

On appeal, Minnick argues that the confession was taken in violation of his Fifth and Sixth Amendment rights to counsel.

1. *Fifth Amendment Right to Counsel.*

Minnick argues that, under *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), Denham's initiation of the interview on Monday, August 25, violated his Fifth Amendment right to counsel under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), since Minnick invoked his right to counsel under *Miranda* during the FBI interview on August 23.

In *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the United States Supreme Court held:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85, 101 S. Ct. at 1884-85. While it is true that Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him.[1] In this kind of situation, the

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1 Minnick's testimony on this point was as follows:

Q: Did you ever ask to stop talking to the FBI man?

A: As I was saying, they drilled me on several questions of the incident and I told them about leaving the jail and that's all I told them.

Edwards bright-line rule as to initiation does not apply. The key phrase in *Edwards* which applies here is "until counsel has been made available to him." *Id.* at 485, 101 S. Ct. at 1885. Since counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied. Therefore, this aspect of Minnick's argument is without merit.

2. *The Sixth Amendment Right to Counsel.*

Minnick argues further that his Sixth Amendment right to counsel under Mississippi law had attached by the time of the Denham interview since warrants for his arrest had issued; the state does not dispute this. *See, e.g., Livingston* v. *State*, 519 So. 2d 1218, 1221 (Miss. 1988). The state, however, argues that Minnick knowingly and intelligently waived his right to counsel when he gave the statements to Denham. In *Cannaday* v. *State*, 455 So. 2d 713 (Miss. 1984), this Court stated:

> However, the Sixth Amendment right to counsel has broader ramifications [than the right to counsel under *Miranda*]. The accused's right to counsel, once that right has attached, is a broad guarantee that the accused "need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 1932, 18 L. Ed. 2d 1149 (1967).

I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing any rights waiver or I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.

Q: What was your lawyer that you talked to—name?

A: I don't recall his name.

Q: How long did you talk to him?

A: I talked to him two different times and—it might have been three different times—but I talked to him the day he told me the next day he would get the court order. He told me that first day that he was my lawyer and that he was appointed to me and to not talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police—I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department.

Id. at 722. *Cannaday* went on to say, "once this right has attached in a criminal case interrogation may not commence without the express waiver by the defendant of the right to counsel," citing *Massiah* v. *United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). *Id. See also Page* v. *State*, 495 So. 2d 436, 440 (Miss. 1986). The precise question before us, then, is whether or not Minnick expressly waived his Sixth Amendment right to counsel when he spoke with Denham.

The standard for determining whether or not a defendant has waived his Sixth Amendment right to counsel was set out in *Brewer* v. *Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). The proper standard to be applied in determining the question of waiver as a matter of constitutional law is "that it [is] incumbent upon the state to prove 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* at 404, 97 S. Ct. at 1242. The right to counsel "does not depend upon a request by the defendant" and "courts indulge in every reasonable presumption against waiver." *Id.* But the *Brewer* opinion makes clear that a defendant can, without notice to counsel, waive his Sixth Amendment right to counsel. *Id.* at 405, 97 S. Ct. at 1242.

Applying this standard to Minnick's situation, the record supports the trial judge's finding that Minnick knew he had the right to counsel as evidenced by the fact that he had previously invoked it. There is also evidence from the record—from Minnick's own testimony at the suppression hearing—that he spoke to an attorney before Denham interviewed him, and that the attorney told him not to talk to anyone.

Denham, by Minnick's own account, warned Minnick again that he need not speak to him in the absence of coun-

sel. Minnick then testified, however, that he refused to sign a waiver of rights form, apparently believing that a waiver of rights form must be signed for any waiver to be valid. The U.S. Supreme Court has rejected this "*per se* rule" argument in *North Carolina* v. *Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), when it stated:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.

Id. at 373, 99 S. Ct. at 1757. The *Butler* opinion went on to point out that while courts must presume that a defendant did not waive his rights, "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*

Minnick, again by his own admission, did not tell Denham he wished to have a lawyer present before he spoke to Denham. Minnick replied to Denham's request to talk about what happened by saying, "It's been a long time since I've seen you," after which the two of them talked about various folks back in Mississippi. Denham then asked Minnick if he would at least talk about how he escaped from Clarke County Jail. By Minnick's own account, he agreed to speak with Denham about the escape—a conscious decision to talk about the escape in the absence of counsel.[2] From Minnick's

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2 Minnick testified at the suppression hearing on this point unequivocally:

> A: I give no direct statement of any kind concerning any murder charges or anything being on the run with Monkey Dyess, nothing that is on paper which I have read. Everything is put down, I advised this, I advised that, I advised this, I advised that. They have no signature and no coercing ears that can say that I give any sort of statement of any kind freely or voluntary to any police officer for anything. I refused and I deny anything put down on paper being that I said so and so, except and excluding the immediate

own words and actions, Minnick clearly relinquished his known right to counsel and responded to Denham's request.

From that point on, the evidence indicates, from Denham's testimony, that Minnick continued, freely and voluntarily, to talk about events after the jail escape. This evidence went virtually unrebutted because Minnick, when questioned about whether or not he voluntarily continued to talk about events after the jail escape, refused to testify further, invoking his Fifth Amendment right against self-incrimination.[3]

> escape from the county jail, which I will state I fully to the best of my knowledge I did escape from the county jail. They have me dead to rights on that and there is no way around it . . . .

3 On cross-examination on this point, Minnick responded:

> Q: Sit down and I'll ask you some questions. Now, Mr. Minnick, pertaining to your rights form, you know what the Miranda Rights are, don't you?
>
> A: That I had a right to remain silent and so on and so forth?
>
> Q: Yes.
>
> A: I have heard it spoke to me before on several occasions.
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> • • • • • •
>
> Q: Deputy Denham did inform you of your rights, didn't he?
>
> A: I can't recall exactly what he said but he recited something he called rights to me and I was not able to read anything of rights waiver or any—you know—because he had no paperwork whatsoever.
>
> Q: You stated to him you refused to sign a waiver of rights but you were willing to talk to him, didn't you?
>
> A: Not exactly those words. I told him—well, actually it was nothing official at all and there weren't no statements official from him in any kind of way. We went through several different conversations about—first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail . . . .
>
> Q: And, then you got into what happened when Lafferty and Thomas were killed, didn't you?
>
> A: I have no comments on that and I stand on the Fifth Amendment.

Under this factual scenario, it is evident that Minnick was aware of his rights, had been advised by an attorney prior to the conversation with Denham, was aware that he did not have to make any statements or answer any questions, and that he made a conscious decision to relinquish his Sixth Amendment right to counsel. The trial judge so found, and under our often-articulated scope of review, this Court will not disturb a trial judge's findings at a suppression hearing unless manifestly in error, or contrary to the overwhelming weight of the evidence. *See Merrill* v. *State*, 482 So. 2d 1147, 1151 (Miss. 1986); *Frost* v. *State*, 483 So. 2d 1345, 1350 (Miss. 1986); *Wiley* v. *State*, 465 So. 2d 318, 320 (Miss. 1985); *Neal* v. *State*, 451 So. 2d 743, 756 (Miss. 1984).

In so holding, we note that had Minnick at any point during his interview with Denham elected to have assistance of counsel before speaking further, the waiver would have immediately been dissolved. *See Patterson* v. *Illinois*, 487 U.S. 285, ____, 108 S. Ct. 2389, 2395, 101 L. Ed. 2d 261, 272 (1988), n.5. However, there is no evidence on the record that Minnick made any such request during Denham's interview. Therefore, we find no error in the lower court admitting the testimony as to Minnick's oral confession at trial. This assignment of error is without merit.

B. The Court Erred in Overruling Minnick's Motion to Prohibit "Death Qualification" of Jury Prior to Guilt Phase.

Minnick filed a motion to prohibit "death qualification" prior to the guilt phase, which was overruled at pre-trial hearing on motions. Minnick argues that the defendant is prejudiced by being required to voir dire the jury on their feelings about the death penalty because jurors who could not vote to impose the death penalty are excluded, resulting in an unfair cross section of the community. In *Cole* v. *State*, 525 So. 2d 365, 374 (Miss. 1987), this Court rejected this argument, as has the United States Supreme Court in *Lockhart* v. *McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). This assignment, therefore, is without error.

C. The Court Erred in Improperly Instructing the Jury as to Burden of Proof.

At the end of the first day of trial, the trial judge gave the jury instructions as to their sequestration—that they must stay together, not talk to anyone about the case, not watch tv, not read the newspapers, etc. He summed up by reminding the jury that their "decision must be based upon and controlled by the greater believable evidence in this courtroom and nowhere else." Minnick complains that the judge stated the wrong burden of proof. The distinction, however, is that the judge was not formally instructing the jury on the law, but rather on their conduct while being sequestered. Minnick makes no showing that this isolated remark prejudiced the jury. He made no contemporaneous objection to the remark, and cites no authority for his proposition. Therefore, this Court need not consider this assignment of error. *May* v. *State*, 524 So. 2d 957, 967 (Miss. 1988); *Ramseur* v. *State*, 368 So. 2d 842 (Miss. 1979).

D. The Court Erred in Allowing Testimony of Marlon Lafferty.

The state offered the testimony of Marlon Lafferty, Lamar's father. The first time the state advised Minnick that it planned to use Lafferty as a witness was the first day of trial, the day before Lafferty was offered as a witness, in violation of Rule 4.06, Unif. Crim. R. Cir. C. Prac. Minnick cites *Box* v. *State*, 437 So. 2d 19 (Miss. 1983), for the proposition that Lafferty's testimony should have been excluded. The guidelines set out in the concurrence in *Box* (Robertson, J.), 437 So. 2d at 22, have been applied by this Court in subsequent cases. *See, e.g., Shaw* v. *State*, 521 So. 2d 1278 (Miss. 1987); *Cole* v. *State*, 525 So. 2d 365, 367 (Miss. 1987); *Griffin* v. *State*, 504 So. 2d 186, 195 (Miss. 1987). Under the *Box* procedure, defense counsel must first make timely objection, to which the trial court should respond by giving defense counsel a reasonable opportunity to interview the witness. *Box*, 437 So. 2d at 23. In the instant case, Minnick's counsel objected and the trial court allowed him a recess to

interview Lafferty. If after the interview the defendant thinks he has been subjected to unfair surprise and that he will be prejudiced by the evidence, the defendant must move for a continuance. *Id.* Minnick's counsel did not move for a continuance, but merely renewed his objection, which the trial court overruled. Since the defendant did not move for a continuance, the trial court did not err in admitting the evidence. Furthermore, Minnick was not prejudiced by the testimony. Lafferty's testimony was brief and concise on one issue—establishing that his son and Thomas were killed sometime after 1:00 p.m., since he had seen them both at lunchtime. Therefore, this assignment of error is without merit.

E. The Court Erred in Failing to Sustain the Defense Challenge for Cause for Juror No. 28.

Minnick contends that Juror No. 28, Kenny Vickery, should have been stricken for cause because Vickery stated during voir dire that in order for him not to impose the death penalty, Minnick would have to prove beyond a reasonable doubt that he should not be executed. The court overruled the challenge for cause as to Vickery; defense counsel then used his twelfth peremptory challenge to remove Vickery. However, defense counsel made no more challenges for cause and requested no more peremptory challenges.

This Court has held that "the general rule is that failure to excuse for cause is error when appellant has exhausted his peremptory challenges." *Billiot* v. *State*, 454 So. 2d 445, 457 (Miss. 1984). *See also Johnson* v. *State*, 512 So. 2d 1246, 1255 (Miss. 1987); *Gilliard* v. *State*, 428 So. 2d 576, 580 (Miss. 1983); *Rush* v. *State*, 278 So. 2d 456, 458 (Miss. 1973); *Chapman* v. *Carlson*, 240 So. 2d 263, 268 (Miss. 1970). *Billiot* went on to say, "Appellant did not thereafter ask for any more challenges either for cause or peremptory. Therefore, there was no reversible error." *Billiot*, 454 So. 2d at 457. Since defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause, or ask for a more peremptory challenges, this assignment of error is without merit.

F. The Court Erred in Admitting Photos of the Dead Bodies.

Before trial, Minnick made a motion to prohibit the introduction of photos of the dead bodies on the grounds of irrelevancy and prejudice. The lower court reserved ruling until trial, at which time the motion was overruled. The state argued at pre-trial hearing that it wished to use the photos to establish *corpus delicti*.

This Court recently, in *Boyd* v. *State*, 523 So. 2d 1037 (Miss. 1988), stated, "If photographs are relevant, the mere fact that they are unpleasant or gruesome is no bar to their admission into evidence." *Id.* at 1040. Furthermore, *Boyd* went on to state that the admission of photographs is within the sound discretion of the trial judge and his decision will be upheld by this Court unless there is an abuse of discretion. *Id.* Under M.R.E. 403, the trial judge may exclude relevant evidence if its probative value is outweighed by its prejudicial effect. The photos admitted in the instant case were not particularly gruesome, though they were realistic; they were few in number; they tended to corroborate the investigative officers' testimony about where and how the bodies were found. They also tended to illustrate the medical examiner's testimony as to cause of death. The trial judge did not abuse his discretion in allowing the photographs into evidence. *See, e.g., Williams* v. *State*, 544 So. 2d 782 (Miss. 1987); *Alford* v. *State*, 508 So. 2d 1039, 1041 (Miss. 1987); *Johnson* v. *State*, 476 So. 2d 1195, 1206 (Miss. 1985). Therefore, this assignment of error is without merit.

G. The Court Erred in Not Granting a Continuance Based on the Untimely Disclosure of the Blymier Evidence by the State.

Ten days before trial, the state informed Minnick's counsel that they had uncovered a material witness, James Blymier, who would testify that he bought two guns from Dyess and Minnick in New Orleans in May of 1986 (the guns were identified by serial number as two of the guns taken from the Thomas mobile home), and would identify Minnick in court. Blymier would also testify that he previously knew Dyess as

one of his employees. The state became aware of this witness only the day before it notified defense counsel. Minnick filed a motion for continuance in order that defense counsel could interview Blymier. The trial judge denied the motion for continuance, but did state that as soon as Blymier was available in Mississippi, the state was to allow defense counsel an opportunity to interview him. Blymier showed up the day he was to testify, and the lower court gave defense counsel a recess during trial to interview Blymier. After the interview, Minnick made a motion to suppress the Blymier testimony, at which time Blymier testified out of the presence of the jury. Minnick again moved for a continuance. The trial judge overruled both motions, allowing Blymier to testify.

The state does not dispute that Minnick's motion for continuance was properly brought before the trial court, as set out in *Gates* v. *State*, 484 So. 2d 1002, 1006 (Miss. 1986), and Miss. Code Ann. § 99-15-29 (1972). Minnick alleges that the trial court abused its discretion by not allowing a continuance in order for him to interview Blymier. The granting or denial of a continuance is within the sound discretion of the trial judge. *Gates*, 484 So. 2d at 1006; *King* v. *State*, 251 Miss. 161, 168 So. 2d 637, 641 (1964). The *Gates* opinion speaks to the issue of a continuance when a witness is unavailable. The present case is distinguishable in that Blymier was made available, albeit in New Orleans, to Minnick's counsel ten days before trial. Minnick's counsel was given as much time as he wanted to interview Blymier before Blymier testified. The need for a continuance under these circumstances is spurious, and Minnick has not shown how he was prejudiced by not having more time than ten days to find and interview Blymier. He made no such showing in his motion for new trial, which *Gates*, 484 So. 2d at 1006, states must be shown. *See also Denton* v. *State*, 348 So. 2d 1031, 1033 (Miss. 1977) (again, dealing specifically with an unavailable witness). This Court has upheld a denial of a continuance where defense counsel has been given an opportunity to interview the witness before trial. *Speagle* v. *State*, 390 So. 2d 990, 991 (Miss. 1980). Therefore, this assignment of error is without merit.

H. The Court Erred in Refusing to Exclude the Blymier Evidence.

Minnick continues his allegation that, because the state did not disclose Blymier as a witness during original discovery, his testimony should have been excluded. The state does not dispute that there was a discovery order entered pursuant to Unif. Crim. R. Cir. Ct. Prac. 4.06. *See Morris* v. *State*, 436 So. 2d 1381, 1387 (Miss. 1983). The question then becomes whether or not the state violated Rule 4.06. As pointed out above, Minnick was aware of Blymier's potential testimony ten days prior to trial; Minnick received notice from the state about Blymier the day after the state uncovered him as a witness. Under these circumstances, it is hard to say that the state violated Rule 4.06. Furthermore, even if the situation could be characterized as one in which the state "failed" to produce discovery, "failure to make pretrial disclosure [does not] require *per se* reversal. We have recognized that non-discovered evidence *may* be admitted at trial if the party against whom that evidence is offered is given a reasonable opportunity to make adequate accommodation." *Henry* v. *State*, 484 So. 2d 1012, 1014 (Miss. 1986). *See also Foster* v. *State*, 484 So. 2d 1009 (Miss. 1986); *Jones* v. *State*, 481 So. 2d 798 (Miss. 1985); *Davis* v. *State*, 472 So. 2d 428 (Miss. 1985); *Cabello* v. *State*, 471 So. 2d 332 (Miss. 1985). Minnick had ten days to deal with Blymier's potential testimony. When Blymier appeared to testify, the trial judge called a recess and gave defense counsel as much time as he wanted to interview the witness. Therefore, the trial court did not abuse its discretion by allowing Blymier to testify. This assignment of error is without merit.

I. The Court Erred in Excluding the FBI-Stockwell Report.

Blymier testified that he bought the guns from Minnick and Dyess and turned them over to his store manager, Stockwell, for Stockwell to turn over to the FBI. FBI Special Agent Bryan Shields testified that he received the guns from Stockwell. Shields also stated that he made a memorandum of his interview with Stockwell which Minnick offered into

evidence to impeach Blymier's testimony; the state objected on hearsay grounds. Minnick then argued that the report falls into the catch-all exception, M.R.E. 804(b)(5), because Stockwell was not available to testify, even though a subpoena had been issued for him, and because the report had guaranties of trustworthiness since Stockwell made his statements to the FBI. The trial judge did not allow the report into evidence on the grounds that it was hearsay.

Stockwell's statement to the FBI as to how he came into possession of the guns did not tally with Blymier's testimony that he, Blymier, had bought the guns from Dyess and Minnick and turned them over to Stockwell. Stockwell's statement to the FBI indicates that he took the guns away from a man named Vincent Mendez, whom he saw take the guns from a black man in an alley behind Blymier's grocery store. Stockwell indicated that he brought them to the FBI when he learned that the guns had been implicated in a murder in New Orleans. Stockwell was shown a photo display of black men, including a picture of Monkey Dyess, to determine if he could positively identify the man who handed the guns to Mendez. Stockwell could not positively identify anyone.

The problem with the FBI report is that it is hearsay within hearsay. The report itself could probably be admitted under M.R.E. 803(6), Records of a Regularly Conducted Activity. The comments to Rule 803(6) indicate that law enforcement reports can be considered under this exception. However, Stockwell's statements are not excepted by 803(6), as the comment indicates:

> However, the source of the material must be an informant with knowledge who is acting within the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Stockwell's statements do not fit any 803 or 804 exception. The question becomes, then, whether the requirements of 804(b)(5) were met. The trial judge, while not making specific findings as to the admissibility of the evidence under a residual exception, found the Stockwell statements to be hearsay which did not fit any exception.

In *Cummins* v. *State*, 515 So. 2d 869 (Miss. 1987), this Court analyzed the requirements of the residual exceptions at length. Rule 804(b)(5) requires that the proponent of the hearsay statement must give notice to the party against whom the evidence is offered. Minnick candidly admits that no notice was given until the day of trial, but that Stockwell's statements came from the state's files in the first place, so that the state could not have been totally surprised by their being offered into evidence. As *Cummins* points out, "[g]reat latitude is usually allowed depending on the facts and circumstances of each case in the context in which the evidence arises." *Cummins*, 515 So. 2d at 873. The overriding concern, before a hearsay statement may be admitted under a residual exception, is that it has equivalent guarantees of trustworthiness similar to those of other exceptions. Minnick argues that because the statements are contained in an FBI report, they are trustworthy. The argument, however, goes to the report itself, and not to Stockwell's statements. Minnick did not offer at trial, nor here on appeal, any evidence that Stockwell's statements themselves were especially trustworthy. Considering the circumstances surrounding the retrieval of the guns, there is no outstanding reason to consider Stockwell's statements particularly trustworthy, as apparently the trial judge did not find them to be. As *Cummins* pointed out, "in the absence of a finding that the hearsay statements offered were sufficiently reliable, it [would be] error to admit them pursuant to the residual exceptions to the hearsay rule." *Cummins*, 515 So. 2d at 874.

The residual exception also requires that the statement be offered as evidence of a material fact. It can be argued that it was material to Minnick's alibi defense as to whether or not he could be tied in with the guns in New Orleans; however,

the next requirement, that the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable effort, weighs against admission. Minnick could have offered alibi evidence through other witnesses as to his whereabouts when these guns came into Stockwell's or Blymier's possession, and could have achieved the same result as Stockwell's statements could have achieved. Minnick made no attempt at trial to offer any such evidence. As *Cummins* states, "this requirement raised an issue of fact as to whether or not [the proponent] used reasonable efforts to procure live testimony. . . . Absent such a finding the evidence cannot be admitted under the residual exception to the hearsay rule." *Cummins*, 515 So. 2d at 874.

Minnick did not successfully demonstrate at trial that Stockwell's statements met the requirements of 804(b)(5), and the trial judge correctly excluded the statements from evidence. Minnick makes no better argument here on appeal. Therefore, this assignment of error is without merit.

J. The Court Erred in Admitting the Guns.

The two guns obtained through the FBI from Blymier/Stockwell, were admitted into evidence through the testimony of FBI agent Linda Lee, who had custody of the guns before trial. The guns had previously been identified as those belonging to Donald Ellis Thomas through serial number checks. Minnick objected to their being admitted on the grounds that chain of custody of the evidence had been broken because Stockwell was not available to testify. However, FBI Agent Bryan Shields did testify that he received the guns from Stockwell. From the time the FBI received the guns until they were admitted at trial, the chain of custody was established. In *Gibson* v. *State*, 503 So. 2d 230, 234 (Miss. 1987), this Court reiterated that the test for continuous possession of evidence is whether or not there is any indication of probable tampering with or substitution of evidence. "Any question as to the chain of possession is within the sound discretion of the trial judge, and, absent abuse resulting in prejudice to the defendant, his decision will stand on appeal." *Id.* There is no indication that the evidence was tampered with in the present case; indeed, there is no allegation by Minnick to that effect. Furthermore, in *Evans* v. *State*, 499 So. 2d 781, 783 (Miss. 1986), this Court stated:

> Physical objects which are relevant and for which the chain of custody is not broken or which are otherwise identified with certainty are admissible into evidence. [cites omitted] Matters regarding the chain of custody of evidence are largely within the discretion of the trial court, and absent an abuse of discretion, this Court will not reverse. [cites omitted] However, the confrontation clause of the Sixth Amendment is restricted to witnesses, and does not include physical evidence. *United States* v. *Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976); *G.E.G.* v. *State*, 389 So. 2d 325, 326 (Fla. Dist. Ct. App. 1980); *State* v. *Armstrong*, 363 So. 2d 38, 39 (Fla. Dist. Ct. App. 1978).

The chain of custody was not broken; the guns had been otherwise identified with certainty; no confrontation clause considerations arise. Therefore, the trial court correctly admitted the guns into evidence. This assignment of error is without merit.

K. The Court Erred in Mentioning that Defense Counsel was Appointed.

At the very beginning of the trial, the trial judge introduced Minnick's attorneys by saying:

> And, the defendant is represented by Mr. Gates from Meridian. He's associated and I have appointed an attorney from Columbus, but I'm sorry, I can't recall your name.

Minnick cites *Sanders* v. *State*, 429 So. 2d 245, 252 (Miss. 1983), wherein this Court, in unequivocal terms, condemned the practice of defense counsel introducing themselves as court-appointed attorneys. However, in *Compton* v. *State*,

460 So. 2d 847 (Miss. 1984), this Court, while reiterating the point that neither judges nor attorneys should introduce counsel as court-appointed, held that such a remark did not constitute reversible error in that case. *Id.* at 848. The remark, though not particularly commendable, does not amount to reversible error in this case. This assignment of error is without merit.

L. The Court Erred in Not Suppressing In-Court Identification by Blymier, Thomas, Beech and Prior.

Minnick makes the argument that the pre-trial identification procedures were suggestive and that the in-court identifications were not sufficiently reliable. The "*Wade* trilogy" and its progeny are the guidelines this Court must follow in determining the competency of identification testimony. *York* v. *State*, 413 So. 2d 1372, 1374 (Miss. 1982). *York* is the leading case in Mississippi on this issue and has been followed by this Court on numerous occasions. *See, e.g., Davis* v. *State*, 510 So. 2d 794 (Miss. 1987); *White* v. *State*, 507 So. 2d 98 (Miss. 1987); *Jones* v. *State*, 504 So. 2d 1196 (Miss. 1987); *Smith* v. *State*, 492 So. 2d 260 (Miss. 1986). As pointed out in *York*, there are two lines of analysis when considering pre-trial identifications: the Fourteenth Amendment due process analysis and the Sixth Amendment right to counsel analysis. Minnick raises only the issue that the pre-trial identification photographic displays were suggestive. He does not specify, however, how any of the photographs were suggestive.

At the pre-trial hearing on Minnick's motion to suppress any identification from the photographs or any in-court identification, the evidence showed that Marty Thomas and Desiree Beech, who were tied up in Donald Ellis Thomas' mobile home, picked out Minnick and Dyess from a photo lineup after they had given a description of their assailant—pale, short, skinny, with a shaved head—to the deputy sheriff. Both testified that they could easily identify Minnick in court from their own independent knowledge of what the man who tied them up looked like, and there was no suggestion that

anyone had told them who to pick from this lineup. Both girls identified photographs of Minnick at trial as well as identifying him in court.

Since there is no allegation that the photo display shown to the girls was suggestive, the trial court did not err in allowing either the evidence of their out-of-court identification of Minnick or their in-court identification of him. As stated in *York*, 413 So. 2d at 1383, "[o]nly pretrial identifications which are suggestive, without necessity for conducting them in such manner, are proscribed."

Thaddis Pryor, who was turkey hunting and stopped and talked to a white man and a black man walking down a road in rural Clarke County on the morning of the murder, gave a description of these two men to the deputy sheriff on the day after the incident. Pryor was not shown any pictures at that time. At trial, Pryor identified photographs of Minnick and Dyess as the same two men he talked to on the morning of April 26. He also identified Minnick in court. Since Pryor did not participate in any pre-trial identification procedures, his in-court identification could not have been tainted by any suggestive pre-trial procedures, and the trial court did not err in allowing him to testify as to Minnick's identity.

As to Blymier's identification of Minnick, there is a question of suggestiveness, since it seems from the record that the district attorney simply took a photograph of Minnick to New Orleans with him and showed it to Blymier. *See Manson* v. *Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). However, there is only fleeting reference to this procedure in the record, and defense counsel did not develop it on the record or here on appeal. The trial judge heard Blymier's testimony out of the presence of the jury in a short suppression hearing during trial, and found that there would be no substantial likelihood of irreparable misidentification in allowing him to identify Minnick in court, since Blymier was able to describe Minnick accurately from seeing him in New Orleans. We cannot say that the trial judge was in error. Even an impermissibly suggestive pre-trial identification does not preclude in-court identification by an eye-witness who viewed the suspect at the procedure "unless: 1) from the

totality of the circumstances surrounding it, 2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of a misidentification." *York* at 1383, citing *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), and *Simmons* v. *U.S.*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). *York*, citing *Neil* v. *Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), goes on to set out the factors to consider in determining whether this standard has been met:

1. Opportunity of the witness to view the accused at the time of the crime;
2. The degree of attention exhibited by the witness;
3. The accuracy of the witness's prior description of the criminal;
4. The level of certainty exhibited by the witness at the confrontation;
5. The length of time between the crime and the confrontation.

York, 413 So. 2d at 1383; *Neil*, 409 U.S. at 199, 93 S. Ct. at 382. *See also Ray* v. *State*, 503 So. 2d 222, 223 (Miss. 1987). Applying these factors to Blymier's identification of Minnick in court, Blymier stated that he was able to identify Minnick in court, not because of the photograph he had seen earlier, but because he had seen Minnick in the alley by his store when Minnick and Dyess sold him the guns. He described Minnick as short, skinny, pale, and with a shaved head, a description which fit Minnick at the time he would have been in New Orleans with the guns. While there was very little testimony developed about Blymier's level of certainty of identification when he first saw the picture of Minnick and none as to the length of time between the sale of the guns to Blymier and his identifying Minnick's photograph, there was also nothing to contradict the accuracy of Blymier's identification. Under the totality of the circumstances, we cannot say that there was a very substantial likelihood of misidentification. Therefore, this assignment of error is without merit.

M. The Court Erred in Excluding Certain Testimony Pertaining to Paul Stanley Ward.

The defense called as a witness Polly Covington, the attorney for Paul Stanley Ward. She testified that Ward pled guilty and was convicted in Clarke County, Mississippi, of possession of Donald Ellis Thomas' stolen truck. Ward was found in Florida with the truck. Defense counsel then asked Mrs. Covington what conversations she had with Ward concerning how he came into possession of Thomas' truck. The state objected to Mrs. Covington being allowed to answer the question because her answer would be hearsay. The trial court sustained the objection. Proffer of the testimony was made, as follows:

Q: What, if any, conversation did you have with Paul Stanley Ward concerning whether he stole the truck of Donald Ellis Thomas?

A: I would assert the attorney/client privilege pursuant to Count IV of the Code's professional responsibility and will follow the Rules of Evidence as to anything except what is in the public record or I have access to in the public record.

Q: What, if any, conversations did you have with Paul Stanley Ward concerning whether or not he had any involvement in the death of Lamar Lafferty and Donald Ellis Thomas?

A: There again, I would assert the attorney/client privilege to any conversations I had with him. That would not be evidence from the public record.

The proffer also showed that Ward waived indictment and pled guilty to grand larceny, stating he had stolen the truck from the streets of New Orleans and had driven it to Florida.

Minnick argues that he should have been allowed to get this testimony before the jury even though Mrs. Covington asserted the attorney/client privilege. He analogizes this situation to that of *Stewart* v. *State*, 355 So. 2d 94 (Miss. 1978), where this Court discussed the right of a defendant to call a

witness who, it was obvious from the other evidence, would refuse to answer questions based on his Fifth Amendment right against self-incrimination. This Court held it was reversible error for the trial court to exclude that witness in that case because the witness could have answered some questions to which the Fifth Amendment privilege did not apply. This Court recognized, however, that there was a split of authority on the issue.

In *United States* v. *Roberts*, 503 F.2d 598 (9th Cir. 1975), speaking of a witness who asserted his Fifth Amendment right not to incriminate himself, the Ninth Circuit stated:

> The Sixth Amendment right to call a witness must be considered in the light of its purpose, namely to produce testimony for the defendant. [cite omitted] Calling a witness who will refuse to testify does not fulfill the purpose. . . .

Id. at 600. *See also United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973).

Assuming the attorney/client privilege is analogous to the Fifth Amendment privilege against self-incrimination, the trial court did not reversibly err by not allowing Mrs. Covington to get on the stand and assert the attorney/client privilege. Nothing could be gained by the defendant having her so testify. The attorney/client privilege aside, anything Ward would have have said to her about how he came into possession of the truck would have been hearsay, anyway. For these two reasons, then, this assignment of error is without merit.

N. The Prosecutor Made Improper Closing Argument.

Minnick asserts that in closing argument at guilt phase, the state's attorney appealed to the jury's emotions with an argument calculated to inflame them. Specifically, he objects to:

(1) The state's attorney arguing that the two deceased victims "testified" through the state medical examiner.

This argument was objected to by defense counsel and overruled.

(2) The states's argument that the jury should do justice for the people of Clarke County.

No objection was made at trial to this line of argument.

(3) The prosecution's rebuttal argument stated he was mad that defense counsel had the audacity to suggest the possibility that the eyewitness testimony of the two little girls could be unreliable.

No objection was made to this argument at trial.

(4) The DA's characterization of Minnick's confession statement that Dyess forced him to shoot one of the victims as an excuse, and that Minnick was the only one identified with the pistol.

This argument was objected to at trial, which the trial court sustained to some extent by telling the jury that it was to find facts from the evidence, and not based on what counsel says. The DA continued this line of argument, to which defense counsel again objected; the objection was sustained.

(5) The DA, in rebuttal, argued that the people are the law and the people must enforce the law.

Defense counsel objected, which objection was sustained; defense counsel then moved for mistrial, which was denied.

The state first argues that as to those statements made by the prosecutor to which no contemporaneous objection was made, the error, if any, is waived, citing *Cole* v. *State*, 525 So. 2d 365 (Miss. 1987), wherein this Court stated: "If no contemporaneous objection is made, the error, if any, is waived. This rule's applicability is not diminished in a capital case." *Id.* at 369. *See* cases cited therein. This procedural bar would apply to allegations (2) and (3) above. The state argues that the other comments must be taken as a whole, and as such, they fall into the wide latitude permitted in final argument, citing *Griffin* v. *State*, 504 So. 2d 186 (Miss. 1987). In *Griffin* this Court stated: "Both sides are afforded wide lati-

tude in their final arguments to the jury so long as they do not argue some impermissible factor." *Id.* at 194. *See also Neal* v. *State*, 451 So. 2d 743, 762 (Miss. 1984). Two of the prosecutor's statements which could be characterized as impermissible, that Minnick was the only one identified with the pistol, which the evidence did not concretely support, and that the people are the law and the people must enforce the law, were objected to and the objections sustained by the trial court. The trial court additionally instructed the jury that it must find the facts, and not rely on what the prosecutor says the facts are. These two objectionable statements were cured by the trial judge.

Taken as a whole, all of these statements fall into the permissible latitude afforded attorneys in closing argument. As this Court stated in *Johnson* v. *State*, 416 So. 2d 383, 391 (Miss. 1982), quoting *Nelms and Blum Company* v. *Fink*, 159 Miss. 372, 382, 131 So. 817, 820 (1930):

> Counsel was not required to be logical in argument; he is not required to draw sound conclusions, or to have a perfect argument measured by logical and rhetorical rules; his function is to draw conclusions and inferences from evidence on behalf of his client in whatever he deems proper, so long as he does not become abusive and go outside the confines of the record.

Minnick was not impermissibly prejudiced by the prosecutor's remarks and, therefore, this assignment of error is without merit.

II. PENALTY PHASE

A. The Court Erred in Overruling Minnick's Motion for Supplemental Voir Dire of the Jury at the Penalty Phase.

Pre-trial, Minnick filed a motion for separate *voir dire* of the jury at penalty phase, which was overruled. This motion was filed in conjunction with his motion that the jurors should not be "death qualified" as discussed. On appeal,

Minnick actually argues that a separate jury should have been empaneled to hear the evidence at penalty phase.

This argument has been rejected by this Court on numerous occasions. *See, e.g.*, *Johnson* v. *State*, 476 So. 2d 1195, 1202 (Miss. 1985); *Jones* v. *State*, 461 So. 2d 686, 692 (Miss. 1984); *Billiot* v. *State*, 454 So. 2d 445, 455 (Miss. 1984); *Culberson* v. *State*, 379 So. 2d 499, 508 (Miss. 1980); *Jackson* v. *State*, 337 So. 2d 1242, 1256 (Miss. 1976). In *Jackson* this Court indicated that the preferred practice was to keep the same jury for both phases of the trial if practical and barring any unforeseen circumstances. *Jackson*, 337 So. 2d at 1256. In *Johnson* and *Billiot*, this Court pointed out that such practice was provided for in Miss. Code Ann. § 99-19-101 (Cumm. Supp. 1987) and that such practice is constitutional. *Billiot*, 454 So. 2d at 456; *Johnson*, 476 So. 2d at 1202. Therefore, this assignment of error is without merit.

B. The Court Erred in Excluding the FBI-Stockwell Report at Sentencing Phase.

This assignment of error as to guilt phase was discussed above. Minnick puts forth no new arguments as to the exclusion of the report at penalty phase. Therefore, the previous discussion applies here, as well. This assignment of error is without merit.

C. The Court Erred in Failing to Grant a Cautionary Instruction as Requested by Defense Counsel.

At the end of the guilt phase, defense counsel asked for a cautionary instruction to the effect that on three occasions there were serious emotional outbursts by members of the victims' families. Minnick wanted the jury instructed to discount any emotional outbursts during deliberation. The instruction was denied. This argument is tied to Minnick's earlier argument that a new jury should have been empaneled before sentencing phase because during guilt phase, several members of the victims' families testified. Minnick characterizes the testimony and the emotional outbursts as tantamount to victim impact evidence which was prohibited in *Booth* v.

Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). Alternatively, he argues that under *Fuselier* v. *State*, 468 So. 2d 45 (Miss. 1985), the emotional outbursts prejudiced Minnick to the point that the jury returned the death penalty based on emotion and sympathy for the victims' families, amounting to an arbitrary imposition of the death penalty.

It is true that several members of the victims' families testified; however, they all testified as to facts relevant and pertinent to the issues in the case. None of these witnesses testified about any emotional impact the death of their loved ones had on them.

Clearly, *Booth* does not apply to this kind of testimony. The *Booth* decision dealt with a Maryland statutory provision that a prepared Victim Impact Statement (VIS) outlining the emotional impact on the family and outlining the family's characterization of the crime, should be introduced into evidence at penalty phase. Such evidence was held by the Booth court to violate the Eighth Amendment. Absolutely nothing of the kind of evidence prohibited by *Booth* was before the jury in the present case.

As to the analysis under *Fuselier*, there was no situation in the present case as there was in *Fuselier*, where a member of the victim's family sat with the prosecutor inside the rail, facing the jury, consulting with the prosecutor, and displaying emotion. There is no specific indication in the present record when these alleged emotional outbursts occurred, or that they at any point interrupted the proceedings.

Based on the record, there was no emotionalism displayed that rises to the level as discussed in *Fuselier*. The trial judge apparently did not believe there was a serious problem, and from the record there is no basis to say that he was in error by denying the request for a cautionary instruction. Furthermore, the jury was adequately instructed on numerous occasions that it must determine sentence based only on the law and the evidence. This assignment of error is without merit.

D. The Court Erred in Refusing Instruction D-3-Sentencing Phase.

Minnick requested the following jury instruction, which was refused:

> The Court instructs the jury that if you have any whimsical doubt then that is a mitigating circumstance.

In refusing the instruction, the trial court told defense counsel that he could argue whimsical or residual doubt to the jury if he chose, which defense counsel did. Minnick cites *Smith* v. *Wainwright*, 741 F.2d 1248 (11th Cir. 1984), as support for his proposition. While that case acknowledges that a "whimsical doubt" might inure to the benefit of a defendant, the opinion does not say that the jury needs to be instructed on whimsical doubt as a mitigating factor. In fact, this discussion was in the context of the court considering an ineffective assistance of counsel claim and, tangentially, the ramifications of a single jury sitting for both phases of a capital trial. In a later Fifth Circuit case, *Johnson* v. *Thigpen*, 806 F.2d 1243 (5th Cir. 1986), the Fifth Circuit again considered whimsical doubt in terms of such being a beneficial by-product of the same jury sitting for both phases of the trial. *Id.* at 1251. That discussion was in the context of what limitations may be imposed on defense counsel's argument so as not to impair the jury's consideration of residual doubt. No discussion of a jury instruction appears in this opinion.

In the recent case of *Franklin* v. *Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988), the United States Supreme Court addressed the issue of whether or not the Eighth Amendment requires that the jury be instructed as to residual doubt as a mitigating factor. In a plurality opinion (the two concurring justices did not disagree on this issue, but voiced some concern over Texas's sentencing procedure), the Supreme Court pointed out that none of its previous opinions held that there is a constitutional right to such an instruction in mitigation, pointing out that residual doubt does not go to the issue of defendant's character, record, or circumstances of the offense, but only to doubt about defen-

dant's guilt which is not, in the strictest sense, a mitigating factor. *Franklin*, 487 U.S. at ____, 108 S. Ct. at 2327, 101 L. Ed. 2d at 166. The opinion focuses on the idea that where a defendant argues residual doubt to the jury, which a defendant is free to do to a relevant extent, the defendant's right to have a jury consider residual doubt is not impaired by the trial court rejecting an instruction on residual doubt. *Franklin*, 487 U.S. at ____, 108 S. Ct. at 2328, 101 L. Ed. 2d at 167.

Since Minnick's counsel was able to argue whimsical doubt to the jury, the jury's consideration of whimsical doubt was not impaired by the trial court's denial of a jury instruction on whimsical doubt. Therefore, this assignment of error is without merit.

E. The Court Erred in Excluding the Prison Record of Paul Stanley Ward at Sentencing Phase.

Defense counsel offered the prison record of Ward at sentencing phase because the records reflect that Ward escaped from the custody of the Mississippi Department of Corrections on November 7, 1986. Apparently, Minnick's argument is that Ward's flight from custody is a fact from which guilt can be inferred, citing *Fuselier* v. *State*, 468 So. 2d 45, 57 (Miss. 1985). It is not clear from either the record or from appellant's brief what crime Ward was supposedly fleeing when he escaped from prison. In this regard, Minnick's reliance on *Fuselier* is totally misplaced; the flight instruction in *Fuselier* was held to be improperly given because flight from the murder scene could have been probative of guilt of two to crimes—murder and escaping from prison. *Id.* at 57.

The trial court correctly excluded Ward's prison records on the basis that they were totally irrelevant to any mitigating factor. Nevertheless, Minnick further argues that the Ward prison records could have gone to whimsical doubt. Again, as discussed above, the trial judge can exclude, as irrelevant, mitigation evidence not bearing on defendant's character, record or circumstances of the crime. Therefore, this assignment of error is without merit.

F. The Court Erred in Excluding Evidence Pertaining to James Dyess at Penalty Phase.

As with the Ward prison record, Minnick also offered in mitigation the prison record of James "Monkey" Dyess to show that Minnick was under the domination of Dyess. The trial judge found the prison records to be irrelevant and not germane to the issue of Dyess' domination of Minnick. While it is true that the defendant has a right to place before the jury any mitigating evidence as to the circumstances of the crime, as well as his character, *see, e.g.*, *McCleskey* v. *Kemp*, 481 U.S. 279, ____, 107 S. Ct. 1756, 1773, 95 L. Ed. 2d 262, 286 (1987), *Skipper* v. *South Carolina*, 476 U.S. 1, 8, 106 S. Ct. 1669, 1673, 90 L. Ed. 2d 1 (1986), *Cole* v. *State*, 525 So. 2d 365, 371 (Miss. 1987), it is clear that the evidence must be relevant to one or more of those factors. While evidence that Minnick's character was such that he could be easily dominated by a stronger personality might be relevant, or evidence that in the circumstances of this offense Minnick was dominated by someone else, there is no indication or reason to believe that the prison records of James Dyess would demonstrate either of those factors. Furthermore, the focus of mitigation evidence is that of the defendant's character, record, etc., so that individualized consideration of sentencing may be engaged in by the jury. *See McCleskey*, 481 U.S. at ____, 107 S. Ct. at 1773, 95 L. Ed. 2d at 262. Dyess' prison records do nothing to focus on Minnick's character or the circumstances of this crime. Therefore, the trial judge correctly excluded the Dyess prison records from evidence at sentencing phase. This assignment of error is without merit.

G. The Court Erred in Admitting Records of Conviction.

Minnick's records of prior convictions from both California and Mississippi were introduced at penalty phase over objection by defense counsel on the basis of lack of foundation by proper custodian. Minnick admits, however, that the records were certified. The California records are a summary of the court records certified by the trial judge where Minnick was committed and sentenced for assault with a deadly

weapon. This Court has approved admitting these kinds of records as proof of a prior conviction. *See DeBussi* v. *State*, 453 So. 2d 1030, 1031 (Miss. 1984); *Lovelace* v. *State*, 410 So. 2d 876, 878 (Miss. 1982). The Mississippi record was a certified copy of the judgment of conviction where Minnick pled guilty to a robbery charge and was sentenced to eight years (the sentence Minnick was serving when he escaped from the Clarke County Jail). This Court has regularly upheld proof of prior convictions made by certified copies of judgments of conviction. *See DeBussi*, 453 So. 2d at 1031 and cases cited therein.

Minnick raises on appeal a different objection to these records—that there is not proof that the Robert S. Minnick on the records was the same Robert S. Minnick on trial. Aside from the problem that Minnick is barred from raising this issue on different grounds from his objection below, *Livingston* v. *State*, 525 So. 2d 1300, 1303 (Miss. 1988), the state elicited testimony from Deputy Sheriff Denham that he had personally retrieved these records of prior conviction for the district attorney and knew that Robert S. Minnick was one and the same at trial as in those records. Denham also supervised Clarke County Jail and knew Minnick to be the same one sentenced for robbery as represented by the Mississippi records. This testimony went unrebutted at trial. Therefore, this assignment of error is without merit.

H. Aggravating Circumstances.

1. *Stacking.*

Minnick filed a motion to prohibit the state from using as aggravating factors that the crime was committed during the course of a robbery and that the crime was committed for pecuniary gain. The argument is the familiar "stacking" argument that the state can elevate murder to felony murder and then, using the same circumstances, can elevate the crime to capital murder with two aggravating circumstances. As pointed out in *Lockett* v. *State*, 517 So. 2d 1317, 1337 (Miss. 1987), this Court has consistently rejected this argument. *See also Jone* v. *State*, 517 So. 2d 1295, 1300 (Miss. 1987); *Wiley*

v. *State*, 484 So. 2d 339, 351 (Miss. 1986). The United States Supreme Court, in *Lowenfield* v. *Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), held that the fact that the sole aggravating circumstance found by the jury in its penalty decision was identical to an element of the underlying offense did not violate the Eighth Amendment. *Lowenfield*, 484 U.S. at ____, 108 S. Ct. at 555, 98 L. Ed. 2d at 583. This assignment of error is without merit.

2. *"Especially Heinous, Atrocious or Cruel."*

Two identical jury instructions, SS-5 and SS-6, were submitted, one for the killing of Thomas and one for the killing of Lafferty, in which six aggravating circumstances were outlined which the jury could consider. One of the aggravating circumstances was the "especially heinous, atrocious or cruel" aggravating circumstances set out in Miss. Code Ann. § 99-19-101 (Cumm. Supp. 1987). Minnick argues that the jury was not properly instructed as to this aggravating circumstance so that it narrows the class of convicted murderers who may receive the death penalty—in other words, the aggravating circumstance is unconstitutionally vague. He directs this Court's attention to the recent United States Supreme Court case of *Maynard* v. *Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), as controlling this issue. In *Maynard*, the United States Supreme Court held the "especially heinous, atrocious or cruel" aggravating factor to be unconstitutionally vague and violative of the Eighth Amendment where the jury was not given a limiting instruction. However, the sentencing jury in the present case was given a limiting instruction as to the meaning of "especially heinous, atrocious or cruel." Therefore, in this case, the "especially heinous, atrocious or cruel" aggravating circumstance, with the limiting instruction, was not unconstitutionally vague, as contemplated by the *Maynard* decision. This assignment of error is without merit.

I. The Court Erred in Instructing the Jury to Make a Finding as to Whether or Not Minnick Intended that a Killing Take Place and as to Whether or Not Minnick Contemplated that Lethal Force Be Used.

Minnick argues that the evidence was insufficient to support the two findings that the jury made that Minnick intended that a killing take place or that he intended that lethal force be used. The jury was instructed, as to each victim, that it should make findings as set out in Miss. Code Ann. § 99-19-101(7) (Cumm. Supp. 1987) as to whether or not:

> (a) the defendant actually killed, (b) the defendant attempted to kill, (c) the defendant intended that a killing take place, (d) the defendant contemplated that lethal force be used.

Minnick first argues under the Weathersby Rule, *Weathersby* v. *State*, 165 Miss. 207, 147 So. 481 (1933), which states that "where the defendant is the only eyewitness to a homicide, his version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Id.* at 209, 147 So. at 482. *See also Jordan* v. *State*, 513 So. 2d 574, 579 (Miss. 1987); *Alford* v. *State*, 508 So. 2d 1039, 1041 (Miss. 1987); *Wetz* v. *State*, 503 So. 2d 803, 808 (Miss. 1987). Minnick contends that the only evidence of the actual killings came from his alleged confession, and that his version of what happened must be accepted as true. Minnick's reliance on the *Weathersby* Rule is totally misplaced in the context of the jury's findings under our death penalty sentencing statute. The *Weathersby* Rule is applicable only in the context of whether or not the defendant killed with malice or intent; in other words, is there sufficient evidence to prove that defendant killed with malice or intent where his version of the incident as the only eyewitness, says otherwise. *See Wetz*, 503 So. 2d at 808. Where the trial on a capital offense has reached the sentencing phase, defendant's guilt has been

found and *Weathersby* considerations are no longer applicable.

Minnick further argues that under *Enmund* v. *Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (which is still controlling in Mississippi by virtue of the required statutory findings the jury must make, rather than the recent standard of "culpable mental state of reckless disregard for human life" set out in *Tison* v. *Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 [1987]), there is insufficient evidence to support these two jury findings. This Court faced a similar argument in *Leatherwood* v. *State*, 435 So. 2d 645, 655 (Miss. 1983), where the defendant argued under *Enmund* that the death penalty could not be imposed upon a "non-trigger man" unless there is proof that the defendant killed, attempted to kill, or intended to kill the victim. *Id.* at 656. This Court found that the Leatherwood situation did not fall within *Enmund*'s holding—Enmund did not participate in the actual robbery nor was he present when the murder was committed, while Leatherwood participated in the robbery and was present when the murder was committed. *Id.* The present case likewise does not fall within *Enmund*'s holding, since Minnick actually participated in the robbery and was present in some role while both murders were committed, such that the jury could reasonably find that Minnick intended the killings and intended that lethal force be used.

This assignment of error is without merit.

J. The Prosecutor Made Improper Closing Argument

This argument is a continuation of the argument Minnick made under the guilt phase. Specifically, Minnick objects to the following comments made by the prosecutor at closing argument of the penalty phase:

> 1. That the death penalty preserves life because it deters crime.

No objection was made to this comment.

2. That robbery is proved.

Objection was made and overruled.

3. That the defendant wants mercy. What mercy did these two men get?

This comment was not objected to.

4. That any other verdict would be a charade to justice.

Objection was made and overruled.

5. That Minnick has had three fair trials (for two murders and robbery).

No objection was made to this comment.

6. That the only way to control Robert S. Minnick is to sentence him to death.

No objection was made to this comment.

7. That Minnick went to New Orleans to sell the guns.

No objection was made to this comment.

8. Where was the leniency for Thomas Lafferty and their families? If you have a tear to shed, shed it for these two individuals.

No objection was made to this comment.

The state, of course, argues that as to those comments for which no objection was made, procedural bar applies. *See Cole* v. *State*, 525 So. 2d 365, 369 (Miss. 1987). Procedural bar would apply to comments (1), (3), (5), (6), (7), and (8). Comment (2) was a statement summarizing the evidence—that there is evidence to prove robbery, which the jury already decided since it returned a guilty verdict. Comment (4) could be characterized as a rhetorical statement to persuade the jury to return a death penalty.

Aside from the procedural bar, the comments taken as a whole do not argue an impermissible factor or go outside the

record. They seem to fall within the wide latitude afforded counsel in closing argument, as discussed earlier in this opinion. Therefore, this assignment of error is without merit.

K. Ineffective Assistance of Counsel.

Minnick alleges that he was denied his Sixth Amendment right to counsel at penalty phase because his attorney committed unprofessional errors sufficient to effect [*sic*] the outcome of the penalty phase. It is interesting to note that Minnick is represented on appeal by the same attorney who represented him at trial (in essence, the attorney is claiming his own ineffectiveness). In any event, Minnick alleges specifically that

1. No mercy instruction was tendered.
2. No objections were made by defense counsel to improper argument by the district attorney.
3. Defense counsel failed to object to two aggravating circumstances which did not fit Minnick's case.

Minnick does not specifically allege whether or not these omissions would have changed the outcome of the sentencing phase.

The applicable test is *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which this Court has applied on numerous occasions. *See, e.g., Byrd* v. *State*, 522 So. 2d 756, 760 (Miss. 1988); *Reynolds* v. *State*, 521 So. 2d 914, 918 (Miss. 1988); *Carney* v. *State*, 525 So. 2d 776, 780 (Miss. 1988); *Cabello* v. *State*, 524 So. 2d 313, 315 (Miss. 1988); *Wiley* v. *State*, 517 So. 2d 1373, 1382 (Miss. 1987); *Merritt* v. *State*, 517 So. 2d 517, 520 (Miss. 1987); *Faraga* v. *State*, 514 So. 2d 295, 308 (Miss. 1987). The *Strickland* test is two-pronged: first, the defendant must show that counsel's performance was deficient. As stated in *Faraga*, 514 So. 2d at 306, "counsel's conduct, viewed as of the time of the actions taken, must have fallen outside of a wide range of reasonable professional assistance." On the record as a whole, Minnick's counsel was diligent, tenacious, persistent, and conscientious in his defense of Minnick. These three omissions cannot fairly be characterized as incompetence. At

trial, it should be remembered that Minnick's confession had been admitted into evidence. By sentencing phase, the jury had already returned a verdict of guilty. Defense counsel effectively argued mercy to the jury in his closing argument; he also effectively argued that the evidence did not fit any of the aggravating circumstances. His closing argument took advantage of the wide latitude afforded attorneys in closing argument such as to counter-balance the wide latitude taken by the state in closing argument. In essence, these three omissions were counter-balanced by the attorney's closing argument such that the jury's consideration of any of these three ideas was not impaired.

The second prong of the *Strickland* test is that a defendant must show that the deficient performance was prejudicial. This prong requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. There is nothing in the record to suggest that these three omissions prejudiced Minnick to the point that there is a reasonable probability that the outcome would have been different. Minnick has not met either prong of the *Strickland* test and, therefore, this assignment of error is without merit.

CONCLUSION

Having reviewed the record as submitted from the Circuit Court of Lowndes County, Mississippi, we find no reversible error therein.

Pursuant to Miss. Code Ann. § 99-19-105(3)(a), (b), (c) and (5) (Cumm. Supp. 1987), and the decisions of both this Court and the Federal courts on the imposition of the death penalty, we have reviewed the record in this case and compared it to the death sentences imposed in the cases decided by this Court since *Jackson* v. *State*, 337 So. 2d 1242 (Miss. 1976), which cases are set forth in Appendix A. Having engaged in this comparison, we now hold that the punishment of death in this case is not too great when the aggravating and mitigating circumstances are weighed against each other, and we are satisfied that the death penalty will not be wantonly or freakishly imposed here.

We conclude that the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supports the jury's finding of statutory aggravating circumstances under § 99-19-101 and that the sentence of death is not excessive or disproportionate to the penalty imposed in other cases, considering the defendant, a jailed habitual offender who escaped from jail, the crime, a double homicide, and the manner in which the crime was committed, in the course of a robbery to acquire money, a vehicle and guns, along with the kidnapping and tying up of two young girls; that the death penalty imposed upon Minnick is consistent with similar cases; and that the sentencing phase of the trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

We affirm both the guilt phase and the sentencing phase of this trial and, therefore, affirm the conviction of Robert S. Minnick on charges of capital murder and the imposition of the death penalty. The date of Wednesday, January 18, 1989, is set as the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., and PRATHER, SULLIVAN, ANDERSON, GRIFFIN and ZUCCARO, JJ., concur.

ROBERTSON, J., dissenting with separate written opinion.

APPENDIX A

DEATH CASES AFFIRMED BY THIS COURT:

Nixon, Sr. v. *State*, 533 So. 2d 1078 (Miss. 1987)
Williams v. *State*, 544 So. 2d 782 (Miss. 1987)
Lockett v. *State*, 517 So. 2d 1317 (Miss. 1987)
Lockett v. *State*, 517 So. 2d 1346 (Miss. 1987)
Faraga v. *State*, 514 So. 2d 295 (Miss. 1987)
Cole v. *State*, 525 So. 2d 365 (Miss. 1987)
Jones v. *State*, 517 So. 2d 1295 (Miss. 1987)
Wiley v. *State*, 484 So. 2d 339 (Miss. 1986)
Johnson v. *State*, 477 So. 2d 196 (Miss. 1985)
Gray v. *State*, 472 So. 2d 409 (Miss. 1985)
Cabello v. *State*, 471 So. 2d 332 (Miss. 1985)
Jordan v. *State*, 464 So. 2d 475 (Miss. 1985)
Wilcher v. *State*, 455 So. 2d 727 (Miss. 1984)
Billiot v. *State*, 454 So. 2d 445 (Miss. 1984)
Stinger v. *State*, 454 So. 2d 468 (Miss. 1984)
Dufour v. *State*, 453 So. 2d 337 (Miss. 1984)
Neal v. *State*, 451 So. 2d 743 (Miss. 1984)
Booker v. *State*, 449 So. 2d 209 (Miss. 1984)
Wilcher v. *State*, 448 So. 2d 927 (Miss. 1984)
Caldwell v. *State*, 443 So. 2d 806 (Miss. 1983)
Irving v. *State*, 441 So. 2d 846 (Miss. 1983)
Tokman v. *State*, 435 So. 2d 664 (Miss. 1983)
Leatherwood v. *State*, 435 So. 2d 645 (Miss. 1983)
Hill v. *State*, 432 So. 2d 427 (Miss. 1983)
Pruett v. *State*, 431 So. 2d 1101 (Miss. 1983)
Gilliard v. *State*, 428 So. 2d 576 (Miss. 1983)
Evans v. *State*, 422 So. 2d 737 (Miss. 1982)
King v. *State*, 421 So. 2d 1009 (Miss. 1982)
Wheat v. *State*, 420 So. 2d 229 (Miss. 1982)
Smith v. *State*, 419 So. 2d 563 (Miss. 1982)
Johnson v. *State*, 416 So. 2d 383 (Miss. 1982)
Edwards v. *State*, 413 So. 2d 1007 (Miss. 1982)
Bullock v. *State*, 391 So. 2d 601 (Miss. 1980)
Reddix v. *State*, 381 So. 2d 999 (Miss. 1980)
Jones v. *State*, 381 So. 2d 983 (Miss. 1980)
Culberson v. *State*, 379 So. 2d 499 (Miss. 1979)

Gray v. *State*, 375 So. 2d 994 (Miss. 1979)
Jordan v. *State*, 365 So. 2d 1198 (Miss. 1978)
Voyles v. *State*, 362 So. 2d 1236 (Miss. 1978)
Irving v. *State*, 361 So. 2d 1360 (Miss. 1978)
Washington v. *State*, 361 So. 2d 61 (Miss. 1978)
Bell v. *State*, 360 So. 2d 1206 (Miss. 1978)
West v. *State*, 519 So. 2d 418 (Miss. 1988)
Houston v. *State*, 531 So. 2d 598 (Miss. 1988)
Davis v. *State*, 512 So. 2d 1291 (Miss. 1987)
Williamson v. *State*, 512 So. 2d 868 (Miss. 1987)
Smith v. *State*, 499 So. 2d 750 (Miss. 1986)
West v. *State*, 485 So. 2d 681 (Miss. 1985)
Fisher v. *State*, 481 So. 2d 203 (Miss. 1985)
Johnson v. *State*, 476 So. 2d 1195 (Miss. 1985)
Fuselier v. *State*, 468 So. 2d 45 (Miss. 1985)
West v. *State*, 463 So. 2d 1048 (Miss. 1985)
Jones v. *State*, 461 So. 2d 686 (Miss. 1984)
Moffett v. *State*, 456 So. 2d 714 (Miss. 1984)
Lanier v. *State*, 450 So. 2d 69 (Miss. 1984)
Laney v. *State*, 421 So. 2d 1216 (Miss. 1982)

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

White v. *State*, 532 So. 2d 1207 (Miss. 1988)
Edwards v. *State*, 441 So. 2d 84 (Miss. 1983)
Dycus v. *State*, 440 So. 2d 246 (Miss. 1983)
Coleman v. *State*, 378 So. 2d 640 (Miss. 1979)

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Stringer v. *State*, 500 So. 2d 928 (Miss. 1986)
Pinkton v. *State*, 481 So. 2d 306 (Miss. 1985)
Mhoon v. *State*, 464 So. 2d 77 (Miss. 1985)
Cannaday v. *State*, 455 So. 2d 713 (Miss. 1984)
Wiley v. *State*, 449 So. 2d 756 (Miss. 1984)
Williams v. *State*, 445 So. 2d 798 (Miss. 1984)

ROBERTSON, Justice, dissenting:

I.

We have a rule that seems to work well in civil cases. A lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present. At the very least he must give notice of his intentions to or obtain consent of opposing counsel. This rule is undergirded by an ethical principle.[4] All accept that a lawyer who approaches a represented third party without going through counsel should be severely sanctioned. And this is so though the lawyer uses a lay representative or paralegal to do his dirty work.[5]

Think what we would do in a personal injury case. The injured party is represented and has been engaged in settlement negotiations with the prospective defendant and his lawyer. Unbeknownst to plaintiff's lawyer, defense counsel's paralegal investigator approaches plaintiff and emerges with a settlement agreement for a sum substantially less than counsel had been demanding. Or, suppose the investigator obtained a(n oral) statement that compromises plaintiff's case.[6] We know well what would happen, the only point of mystery being whether defense counsel would be shot or flogged.

We regard this rule a fair one. Its genesis lies in our concern with fairness. That the third party has a lawyer is taken as an expression of his wish to be dealt with only through counsel. There is substantial probability of the party being

4 *See* Rule 4.2 of Mississippi Rules of Professional Conduct, effective July 1, 1987, entitled "Communication with person represented by counsel."

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

5 *See* Rule 5.3, Miss. R. Prof. Conduct.

6 *See Bruske* v. *Arnold*, 44 Ill. 2d 132, 254 N.E.2d 453, 455 (1969); *see also Trans-Cold Express Inc.* v. *Arrow Motor Transit, Inc.*, 440 F.2d 1216, 1219 (7th Cir. 1971).

overreached when his lawyer is not there. The integrity of the lawyer-client relationship is at stake.

I know of no basis for assuming that a prosecuting attorney is exempt from these rules. Indeed, the district attorney has a special responsibility for assuring that the accused has counsel and is not taken unfair advantage of.[7] We have recognized in a variety of contexts that the knowledge and conduct of law enforcement authorities are imputed to the prosecuting attorney as representative of the state. *See, e.g.*, *White* v. *State*, 498 So. 2d 368, 370 (Miss. 1986); *Foster* v. *State*, 484 So. 2d 1009, 1011 (Miss. 1986); *Fuselier* v. *State*, 468 So. 2d 45, 56 (Miss. (1985). By analogy, Deputy Sheriff Denham was the agent and alter ego of the district attorney when he went to San Diego to interview Minnick. *See People* v. *Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 422, 348 N.E.2d 894, 898 (1976).

If I understand the facts correctly, Minnick was taken into custody and placed in jail in San Diego, California, on August 22, 1986. He was interviewed by an FBI agent on August 23. At that time, according to the majority, "Minnick answered some questions, but then ceased to answer, saying, 'Come back Monday when I have a lawyer.' " After the FBI interview but before Deputy Denham arrived, a lawyer was furnished to Minnick, apparently a San Diego public defender, who, according to the majority, "told him not to speak to anyone else about any of the charges against him."[8] Under these facts we need not engage in the familiar metaphysics of attachment of the right to counsel. The right had attached. *See Nicholson* v. *State*, 523 So. 2d 68, 76-77 (Miss. 1988); *May* v. *State*, 524 So. 2d 957, 967 (Miss. 1988); *Jimpson* v. *State*, 532 So. 2d 985, 988-89 (Miss. 1988); *see also Page* v. *State*, 495 So. 2d 436, 439-42 (Miss. 1986); *Cannaday* v. *State*, 455 So. 2d 713, 722 (Miss. 1984). Minnick had "invoked" his right to counsel and had been furnished counsel before Deputy Sheriff Denham arrived at his San

7 *See* Rule 3.8, Miss. R. Prof. Conduct.

8 This fact is not in the record. It was conceded, however, by Minnick's appellate counsel at oral argument.

Diego jail cell.[9] Knowledge of these facts was imputed to Denham. *Arizona* v. *Roberson*, 486 U.S. 675, ____, 108 S. Ct. 2093, 2101, 100 L. Ed. 2d 704, 717 (1988). Whatever protections the right affords were Minnick's to enjoy. *Page* v. *State*, 495 So. 2d 436, 439-42 (Miss. 1986).

The facts before us, imagine this scenario. The day before trial the district attorney, or some representative of the prosecution force, *e.g.*, a deputy sheriff, visits Minnick in his jail cell. This is done without so much as a "By your leave" or "Kiss my foot" to Minnick's lawyer. The district attorney says, "Mr. Minnick, your trial begins tomorrow and there are a few points I want to clear up before the trial begins." Assume then that the district attorney (or his representative) reads Minnick the standard *Miranda* warnings and without obtaining any express acknowledgment or waiver, written or oral, proceeds to ask Minnick questions, to which Minnick responds. Assume further that Minnick is *not* told "Now, Mr. Minnick, we know that Mr. Gates is your lawyer and perhaps you ought to talk to him before we interview you;" all that is said to Minnick is the bare minimum required by *Miranda*. I cannot imagine that we would allow use at trial of the fruits of such a pre-trial interview. *See People* v. *Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 422-24, 348 N. Ed.2d 894, 898-99 (1976). What I can imagine is the language with which this Court would unanimously condemn such a shoddy practice.

How is that different from what we have here? Minnick's entitlement to the protections of counsel were not lesser on August 25, 1986, than on the day before trial. I know of no principled basis for saying that the shield of counsel and Minnick's right thereto was less potent on August 25 than on the day before trial.

The implicit premise of the majority opinion is that the accused's right to counsel and privilege against self-

9 In a very real sense this case begins the "day after" *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Today's concern is the case scenario after the *Edwards* accused has established an attorney-client relationship with a lawyer albeit in this instance an out of state public defender.

incrimination are in the jailhouse like a child at birth, alive and well but rather incompetent and defenseless, growing into a mature adult-like right only come trial time. But what in logic or law or life suggests the right to counsel ought be so regarded? The apt analogy is the full grown Minerva who sprang from the head of Zeus. The right to counsel is as full grown at the moment of attachment as it will ever be, as available to the accused then as ever, and at each point thereafter where there exists a possibility for irremedial prejudice to the accused, for once the confession is obtained, the prosecution is generally a downhill proposition. There is no more critical stage than where a confession is sought.

II.

Courts ought enforce those rules emanating from the best reading that may be given the principles that fit and justify the positive law of the state. That law ought be seen as an organic whole. The positive law possessing power this day ranges from the privilege against self-incrimination and right to counsel embedded in Article 3, Section 26 of the Mississippi Constitution of 1890, across statute and case law to Rules 1.02-1.05 of our Uniform Criminal Rules of Circuit Court Practice.

The principles which fit and provide the best, albeit far from perfect, justification for our positive law today include at least these four: (1) at each encounter following custody, the individual should be treated fairly;[10] (2) because of the realities of the criminal justice system, the accused is ordinarily weaker than the prosecution and needs special protection to assure fairness; (3) confessions are not the preferred form of evidence in a criminal prosecution; and (4) the accused should have counsel at all critical stages of the proceedings

10 For instance, the section of our Constitution dealing with the right to counsel, Article 3, § 26, is a "positive command, and without it due process of law is impossible." *Stewart* v. *State*, 229 So. 2d 53, 55 (Miss. 1969). *See also Waldrop* v. *State*, 506 So. 2d 273, 275 (Miss. 1987) ("This Court has embraced a right to . . . counsel inherent in the due process clause of the state constitution."); *Reed* v. *State*, 430 So. 2d 832, 837 (Miss. 1983).

against him. I say these principles are embedded in our positive law in the sense that no honorable and rational person who rejected these principles in any significant way could possibly have written the rules in the field—again from Section 26 of our Bill of Rights to the pre-trial provisions of our rules of criminal practice.

If the efficacy of our criminal justice system depends upon the accused not asserting or enjoying his claims and protections regarding access to counsel, then there is something very wrong with that system. I dare say no one can divine a policy of preference for ignorance or waiver in the valid rules in the field. No such policy fits the text of our rules in the field much less provides the best justification for the existence of those rules today. No one who believed that the efficacy of the criminal justice system ought depend upon a preference for ignorance of the accused or waiver of his right to counsel could possibly have written our law as it is; hence, the law cited by the majority cites—but then ignores—that there is a strong presumption against waivers of the protections of counsel.[11]

What we have said above regards the substance of the right to counsel. There is a separate and important concern regarding the form of that rule. Our law does no one a favor when it provides fuzzy rules in plastic form. Where tensions are high, controversy great, and much at stake (and there is

11 *See Michigan* v. *Jackson*, 475 U.S. 625, 633, 106 S. Ct. 1404, 89 L. Ed. 2d 631, 640 (1986); *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). A waiver ought be accepted only if made with full awareness of "the dangers and disadvantages of self-representation," *Faretta* v. *California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975); *see also Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 241, 87 L. Ed. 268 (1942) (accused "may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with his eyes open"). Indeed, "courts indulge in every reasonable presumption against waiver," *Brewer* v. *Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424, 440 (1977). I am no devotee of subjective standards within our law. Still it takes little awareness or common sense to realize that objectively adequate warnings by an opposing party, whether detailed or cursory, simply cannot satisfy this high standard.

never more at stake than in a case of capital murder), the need for bright line rules is at its highest. The form of the rule formally realizing the accused's right to counsel should provide an identifiable line between what may be done and what may not. All should be told that, once the right to counsel has attached, the accused may be dealt with only through counsel. Such clarity in expression is as important to law enforcement as to the citizen. *See Arizona* v. *Roberson*, 486 U.S. 675, ____, 108 S. Ct. 2093, 2097, 100 L. Ed. 2d 704, 713 (1988). This is no novel idea. Did not even *Miranda* say as much?[12]

We have this sort of rule in civil cases. It seems to work well. Its predicate is fairness. If such a rule obtains in civil cases, where there is no constitutional right to counsel, what reason or principle can there be for denying a like rule in a criminal case where there is such a right?[13] If the rule obtains in civil cases where mere money is at stake, why not where the executioner approaches?

I respectfully dissent.

GRIFFIN, J., not participating.

12 "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda* v. *Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 723 (1966).

13 *State* v. *Sparklin*, 296 Or. 85, 672 P.2d 1182, 1187 (1983); *People* v. *Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 422, 348 N.E.2d 894, 898 (1976).

Letter dated March 2, 1989 of Amy D. Whitten, Esq. (Administrator of the Supreme Court of Mississippi) to Leslie C. Gates, Esq. and Marvin L. White, Jr., Esq. regarding petitioner's motion for rehearing and requesting briefs in light of *Roper* v. *Georgia*, 375 S.E.2d 600 (Ga. 1989)

[On the Letterhead of the Supreme Court of Mississippi]

March 2, 1989

Leslie C. Gates, Esq.
101 Shields Building
906 20th Avenue
Meridian, MS 39301

Marvin L. White, Jr.
Assistant Attorney General
Office of Attorney General
Post Office Box 220
Jackson, MS 39205

Re: Robert Minnick v. State
No. DP-79
Petition for Rehearing

Ladies and Gentlemen:

In connection with its consideration of the petition for rehearing in the above case, the Court desires a supplemental brief from each of you.

We invite your comments on the recent decision of the Supreme Court of Georgia in *Roper* v. *State*, 375 S.E.2d 600 (Ga. 1989), decided February 2, 1989, and, particularly, your views on whether *Roper* is a correct exposition of the law and, if so, upon the effect, if any, *Roper* might have on the case at bar.

This is to advise that each of you have until March 21, 1989, to file your supplemental brief.

Sincerely yours,

AMY D. WHITTEN

Court Administrator

Order of the Supreme Court of Mississippi denying petitioner's motion for rehearing dated October 25, 1989

SUPREME COURT OF MISSISSIPPI

MINUTE BOOK

Year 1989—Book 2

WEDNESDAY, OCTOBER 25, 1989:

EN BANC

03-DP- 0079 *Robert S. Minnick* v. *State of Mississippi*; Appeal No. 6045 from Judgment dated MAY 23, 1987, Clarke County Circuit Court; DISPOSITION—On Change of Venue to Lowndes County. Petition for Rehearing Denied. Roy Noble Lee, C.J., Hawkins, P.J., Dan Lee, P.J., and Anderson, J., Concur. Prather, Robertson, and Sullivan, JJ. Dissent. Pittman and Blass, JJ., Not Participating.

Order of the Supreme Court of the United States granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis* dated April 23, 1990

SUPREME COURT OF THE UNITED STATES

No. 89-6332

Robert S. Minnick,

Petitioner

v.

Mississippi

On PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Mississippi.

On CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 23, 1990